Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

MARCH Term, 1995

Azariah Michael Ellington and
Joy Elaine Ellington,

Petitioners

Versus

The Superior Court of
Los Angeles County,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Azariah M. Ellington and
Joy E. Ellington
In Pro Per
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PRESENTED QUESTIONS

I

If the "legislative intent" of the "litigation privilege" is to establish a veil of protection for the public to have free access in a judicial proceeding, what constitutional privilege is provided to dictate the intentional use of known false statements of material facts and issues as a defense?

II

42 USC section 1983 demands that a public official can only claim "absolute privilege" upon the burden of proof that the said acts performed were within his lawful duty. What burden can be placed on the participates of a judicial proceeding to assure protection of the constitutional rights of all parties involved, if aggrieved party has followed all the states laws concerning "attempting to bring all damages within the proceeding", but denied the very privilege of a hearing?

III

Even under section 1983, Due Process, there is a prerequisite of a hearing before termination of an issue, then how can a private party obtain fair constitutional rights of Due Process under the "absolute privilege" without defined guidelines for all litigant parties?

IV

What protection is available to those who suffer damages which arises within the litigation, but such

PRESENTED QUESTION, cont.

IV, cont.

damages are not discovered until the litigation has ended, does not the constitution provide relief for all citizens by the breach of duty (especially intentional breach with reckless disregard for the truth) against others?

V

The core of a fraudulent act is deceit. How can the deceit be deemed privileged, if such deceit is allowed to operate within the very fiber of a judicial proceeding without some form of accountability?

TABLE OF CONTENTS

	PAGE
Presented Questions	i - ii
Table of Authority	
Opinions Below	1 - 2
Jurisdiction	2
Constitutional Provisions Involved	2 -3
Statement of Case	3 - 8
Statement of Facts	8 - 9
Reasons for Granting Certiorari	9 - 13
Argument	13 - 28
Conclusion	28 - 30

Appendix:

Ruling of The California Supreme Court	1a
Ruling of The Court of Appeal of the State of California, Second Appellate District, Division Four	2a-2a9
Remittitur Notice: The Court of Appeal of the State of California, Second Appellate District, Division 4	3a
Ruling of Los Angeles Superior Court	4a

TABLE OF CONTENTS, cont.

PAGE

Appendix cont:

Transcript: Motion for Leave to Amend Complaint 5a-5a1

Petitioners' Opening Brief: Cover and Index of Points 6a-6a2

Petitioners' Opening Brief, Table of Authorities 7a-7a3

Notice of Motion for Leave to File Amended Complaint 8a-8a3

TABLE OF AUTHORITY

CASES	PAGE
American Mfrs. Mut. Ins. Co. v. American Broadcasting - Paramount Theatres, Inc. (1966) 87 S.Ct. 1, 2, 3	28
Bartkus v. Illinois 359 U.S. 121; 79 S.Ct. 676; 3 L.Ed. 2d 684	27
Brown v. Superior Court (1965) 234 C.A. 2d 628, 44 Cal.Rptr. 519	22
California Casualty. Gen. Ins. v. Superior Court 173 Cal.App. 3d 274, 279, 218 Cal.Rptr. 817, 819	16
Carson v. Facilities Development Co. (1984) 36 C.3d 830, 206 Cal.Rptr. 136	22
Chambers v. Baltimore, etc. R. Co., (Ohio 1907) 28 S.Ct. 34, 207 US 142, 52 L.Ed. 143	25
Coleman v. Caddo Parish School Bd., La.App 2 Cir. 1994, 635 So.2d 1238	11
Concrete Pipe & Prod. v. Const. Laborers Pen. Tr. (1993) 113 S.Ct. 2254, 2277	26
Denham v. Superior Court of Los Angeles County, 2 Cal.3d 557, 568, 86 Cal.Rptr 65, 71, 468 P.2d 193	16, 18

TABLE OF AUTHORITY

CASES	PAGE
Dimuccio v. D'Ambra, M.D Fla. (1991) 779 F.Supp. 1318	17
Dixon v. City of Lawton, Okl., C.A. 10 (Okl. 1990) 898 F.2d. 1443	26
Duares v. City of N.Y., C.A.2 (N.Y.) 1993, 985 F3d 94	9
Farina v. U.S., D.C. App.1993, 622 A.2d 50	10
Fisher v. Larsen (1982) 78 L.Ed 2d 335, 464 U.S. 959, 138 C.A.3d 627, 188 Cal.Rptr. 216	11,14
Frusetta v. Hauben (1990, 2nd Dist) 217 CA3d 551, 266 Cal.Rptr. 62	21
Gagne v. Bertran (1954) 43 C.2d. 481, 275 P.2d. 15	23
Gallardo v. Board of County Com'rs, Kearny County Kan., DKan.1994, 857 F.Supp. 783	18
H & M Associates v. City of El Centro (1980) 167 Cal.Rptr. 392, 109 C.A.3d 399	10

TABLE OF AUTHORITY

CASES **PAGE**

Harlow v. Fitzgerald (1982)
457 U.S. 800, 817, 102 S.Ct.
2727, 2738, 73 L.Ed2d 396 10

Herrera v. Superior Court (1984)
158 Cal.App.3d. 255,
204 Cal.Rptr. 553, 556 27

Hirsa v. Superior Court (Vickers) (1981)
118 CA3d. 486, 173 Cal.Rptr. 418 12

Hoai v. Vo, C.A.D.C.
(1991) 935 F.2d 308 10

Imbler v. Pachtman (1976) 424 U.S. 409,
47 L Ed 2d 128, at 145, 96 S. Ct. 984 10

In re Marilyn H. (1993) 19 Cal.Rptr. 2d
544, 5 Cal.4th 295, 851 P.2d 826 10

In re Marriage of Horowitz
(App.1 Dist.1984) 159 C.A.3d 377,
205 Cal.Rptr. 880 28

Jacobi v. Blocker,
E.D.Va.1994, 153 F.R.D. 84 17

Kachig v. Boothe (1972)
22 Cal.App.3d 626, 634,
99 Cal.Rptr. 393, 397 11

TABLE OF AUTHORITY

CASES	PAGE
Kimmel v. Goland (1990) 51 Cal.3d 204, 213; 271 Cal.Rptr. 191, 198	15, 24
Kreutzer v. San Diego County (1984) 153 CA 3d 62, 100 Cal.Rptr. 322	23
Kupiec v. American Intern. Adjustment Co. (1991), 235 Cal.App.3d 1329; 1 Cal.Rptr.2d 371	11, 14
Marasco v. Wadsworth (1978) 21 C.3d. 82, 147 Cal.Rptr. 843	12, 20
Matter of Anderson (1990) 795 P.2d 64, 247 Kan. 208, certiorari denied 111 S.Ct. 985, 498 U.S. 1095, 112 L.Ed.2d 1069	12, 20
Moradi-Shala v. Fireman's Fund Ins. (1988) 46 Cal.3d 287,308,250 Cal.Rptr. 116, 129, 758 P.2d 58	19, 20
N.A.A.C.P. v. Hunt, C.A.11 (Ala.) 1990, 891 F.2d 1555	10
Olson v. Hart, C.A.10 (Kan.) 1992, 965 F2d. 940	27

TABLE OF AUTHORITY

CASES **PAGE**

Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karms, Inc. (1986) 42 C.3d 1157, 232 Cal.Rptr. 567 ..... 11, 15

Parchment Co. v. Paterson P. Paper Co. (1931) 282 U.S. at p. 564, 51 S.Ct. at p. 251, citing Gilbert v. Kennedy (1871) 22 Mich. 117, 130 12

People v. Story (1985 2 Dist) 168 C.A.3d 849, 216 Cal.Rptr. 158 22

People v. Truer (1985 5 Dist) 168 C.A. 3d 437, 214 Cal.Rptr. 869 22

Professional Real Estate Investors v. Columbia Pictures (1993) 113 S.Ct 1920,1928, 1929 ..... 18, 27

Raya v. Maryatt Industries, N.D. Cal.1993, 829 F.Supp. 1169 19

Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal.3d 880, 891-892 19

Silberg v. Anderson (1990) 50 Cal.3d. 205, 214; 266 Cal.Rptr. 638, 643 ..... 20, 25

Spencer v. State Farm Mut. Auto. Ins. (1957) 152 Cal. App.2d 797 19

TABLE OF AUTHORITY

CASES	PAGE
Sprague v. Equifax Inc. (App. 2 Dist. 1985) 166 C.A.3d 1012, 213 Cal.Rptr. 69	22
State v. Monastero, 1988, 424 N.W.2d 837, 228 Neb. 818, appeal dismissed 109 S.Ct. 358, 488 U.S. 936, 102 L.Ed2d 349	10
Steele v. Stephan, 633 F.Supp. 950	10
Underwager v. Salter, C.A. 7 (Wis) 1994, 22 V.3d 730	11
Upchurch v. New York Times Co., S.C. 1993, 431 S.E.2d 558	11
US v. Clark (1990 Cal) 918 F.2d 843	22
U.S. v. Riggs, N.D.Ill. 1990, 743 F.Supp. 556	10
U.S. v. Stanley 483 U.S. 669, at 697, 107 S.Ct. 3054, at 3071, 97 L.Ed.2d 550	10

TABLE OF AUTHORITY

CASES	PAGE
Woodard v. Mennella (EDNY 1994) 861 F.Supp. 192	25
Zinermon v. Burch 494 U.S. 126, 110 S.Ct. 984	27
STATUTES	
18 U.S.C.A. § 1621	22
42 U.S.C.A. § 1983	9, 10, 11, 25
28 U.S.C.A. § 1257	12
Cal. Civ. Pro. § 30	11
Cal. Civ. Pro. § 47	5, 6, 7
Cal. Civ. Pro. § 473	11
Evidence Code § 356	22
Penal Code § 118	22
Penal Code § 119	22
Penal Code § 127	22
Vehicle Code § 15	22
Vehicle Code § 22406	22

TABLE OF AUTHORITY

CASES **PAGE**

Vehicle Code § 40300 22

Vehicle Code § 40503 22

UNITED STATES CONSTITUTIONAL PROVISIONS

FIRST AMENDMENT ..... 10 - 27

FOURTEENTH AMENDMENT ..... 9 - 25

CALIFORNIA CONSTITUTIONAL PROVISIONS

ARTICLE 1 § 1 10

ARTICLE 1 § 2 11

ARTICLE 1 § 7 10

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

AZARIAH M. ELLINGTON AND
JOY E. ELLINGTON,

Petitioners

Versus

THE SUPERIOR COURT OF
LOS ANGELES COUNTY

Respondent

PETITION FOR A WRIT OF CERTIORARI

To the Honorable, the Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

The Petitioners, Azariah M. Ellington and Joy E. Ellington pray that a Writ of Certiorari issue to review the orders of the California Supreme Court, The California Court of Appeal, the Superior Court of the State of California, Los Angeles County.

OPINIONS BELOW

The Denial of the California Supreme Court, entered December 21, 1994 is recorded and appears at page 1a of the Appendix herein.

The Ruling of the California Court of Appeal, entered October 17, 1994, is recorded and appears at page 2a of the Appendix herein.

Remittitur Notice of the Court of Appeal of the State of California, Second Appellate District, Division 4, dated January 24, 1995 is recorded and appears at page 3a of Appendix herein.

The Ruling of the Los Angeles Superior Court, East District Pomona, entered January 11, 1993 is recorded and appears at **page 4a of the Appendix** herein.

JURISDICTION

The final Order of the California Supreme Court is dated December 21, 1994, and these Petition for Writ of Certiorari is filed timely within 90 days thereof. The jurisdiction of this Honorable Court rests upon U.S.C.A., Constitution, Amendment 1, U.S.C.A, Constitution, Amendment 14, 42 U.S.C.A. § 1983, 28 U.S.C.A § 1257 and Rules of the Supreme Court of the United States, Rule 10.1(c).

CONSTITUTIONAL PROVISIONS INVOLVED

FIRST AMENDMENT AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

CONCERNING THE FIRST AMENDMENT:

All speech is not privileged, particularly speech which derived from a conspiracy to commit a crime or a tort, with the intent to deprive and harm another, with the knowledge that such speech will mislead the Court and deprive another of his or her right to due process and a fair hearing.

Also that such speech is set forth in reckless disregard for the truth and evidences a course of conduct, as such speech and conduct conflict with the core meaning of "freedom of speech", which is the

constitutional right to say what you want as long as you do not interfere with others' rights, as these others' rights are protected by the laws of defamation, public safety, etc.

CONCERNING THE FOURTEENTH AMENDMENT:

A citizens has been deprived of his or her right to due process when a Court acts to overlook the law and circumstances before it, then acts to create law, and wrest other law and procedure to effect a result that is neither privileged or the intent of the legislature (to be explained in the Petitioners' Argument and Appendix), as such conduct strikes against the core of the meaning of "due process", which is that a person should always have a real chance to have their "day in court" present his or her side in a legal dispute and that no law or government procedure should be arbitrary or unfair.

STATEMENT OF CASE

Petitioners are Azariah Michael Ellington and Joy Elaine Ellington, In Pro Per.

Respondents are the Superior Court of California, County of Los Angeles, East District Pomona and the Court of Appeal of the State of California, Second Appellate District, Division Four and the California Supreme Court.

Real parties in interest are Robert Barber Stull, Nationwide Insurance, Douglas Bollinger, John Walker, Richard Delatorre, Charles Crismier III, and Michael Manning, and has an interest that is directly af- fected by this proceeding in that they are Respondents in the action entitled Ellington vs. The Superior Court of Los Angeles County, Civil Action No. B073682 and S043368.

Petitioners are persons beneficially interested in the issuance of a writ of review by virtue of the fact that they are Appellants in the action entitled Ellington vs. The Superior Court of Los Angeles County, Civil

Action No. B073682 and S043368.

On October 17, 1994, the Honorable Presiding and Associate Justices of the Court of Appeal of the State of California, Second Appellate District, Division Four filed a disposition to the Petitioners' Appeal, treating it as a "writ of mandate" and denied, see **Appendix 2a.**

On August 10, 1994, the Petitioners were represent before said Court of Appeal; the Honorable Judge C.S. Vogel, Acting Presiding Judge, then indicated to the Respondents that the Petitioners would not be deprived of their rights to the Respondents. This message was so impressed upon the Petitioners and Respondents so that they all subsequently related it to the Superior Court Judge who was presiding over matters (consolidated case no. KC013366) that arose from facts related to this Petition.

On January 11, 1993, Motion for Leave to File Amended Complaint was heard to add tortious conduct allegations, and other defendants, the Petitioners were deprived of the right to timely pursue action against the Respondents. When the Petitioners appealed the Superior Court's decision, an automatic stay was placed, holding the Petitioners' right to action against the Respondents.

The Superior Court's conduct was such that no person should have to experience the humiliation and distress acted by that Court; moreover, no citizen should have to suffer under the apparent unconcern for the rights and safety of his or her person and/ or property; as the conduct acted against the Petitioners, by the Respondents, was verbally degraded to a mere **nursery rhyme** (court's transcript, in pertinent part, **see appendix 5a**), and likewise discharged, which is a breach of professional conduct, exceed beyond the jurisdiction of the Superior Court, and is unconstitutional.

When deciding this matter, the Court of Appeal

knowingly and further deprived the Petitioners of their rights to the preservation of their action, under the laws pertaining to an automatic stay, when a matter is on appeal, which is unconstitutional and beyond the jurisdiction of the Court of Appeal, and the jurisdiction of the California Supreme Court.

Petitioners contend that the Court of Appeal as phrased the Petitioners' case to make it appear that the entire matter was settled at the Superior Court level, at the Mandatory Settlement Conference (MSC) held October 15, 1993, however, the Court of Appeal was aware of, and referred to documents which demonstrated the agreement upon which the Petitioners and the Respondents would proceed for litigation purposes; and such agreement clearly states that negligence was the only matter settled at the Superior Court level, per MSC transcript.

Petitioners contend that the Court of Appeal has verbally accelerated the Petitioners case to final adjudication in the Superior Court, that the "litigation privilege (**Civ. Code § 47; Appendix p. 27a - 27a3**) might be applicable for the preservation of the Respondents, as the Respondents had made no claim, at any time during this appeal for a litigation privilege. And it causes the Petitioners to wonder why a neutral party would offer this privilege to the Respondents without qualification. Particularly, when facts, laws and evidence (Motion for Leave to Amend Complaint, Declaration, Third Amended Complaint with exhibits to support within Clerk's Transcript, and Petitioners' Opening Brief) was within the Court's possession which clearly demonstrated that the Respondents had acted conduct against the Petitioners which vitiate any privilege; i.e., "course of conduct" and "reckless disregard for the truth", with malice.

Such conduct is an abuse of discretion, beyond the jurisdiction of the lower Courts, and unconstitutional.

Petitioners contend that because the parties had an agreement concerning settlement, it is un- constitutional for the Court of Appeal to apply the "litigation privilege" to deprive the Petitioners of their contract with the Respondents.

Petitioners contend that it is a breach of professional conduct, beyond the jurisdiction of the Court of Appeal and unconstitutional for a judicial body to knowingly bypass proper law and procedure when adjudicating a matter.

Petitioners contend that it is unconstitutional and against public policy to deny the Petitioners access to the courts for fair adjudication of issues, when the Petitioners have timely and properly brought their Motion for Leave to Amend Complaint within the judicial proceedings, according to the laws of the State of California concerning bringing all matters before the Court within the present proceeding.

Petitioners contend that the litigation privilege, Cal. Civ. Code § 47 **(App. 27a)** has been uncon- stitutionally applicated to unfairly alter the Petitioners' appeal, and deprive the Petitioners of their right to due process.

When the Petitioners requested review form the California Supreme Court, the request was simply denied without explanation.

Petitioners allege that they can not get a fair hearing in the lower courts; as the Superior Court, Court of Appeal and the California Supreme Court have demonstrated conduct toward the Petitioners' cause which deprives the Petitioners of a fair hearing,
and their rights to a fair hearing and due process of the law, as provided by the USC Amendment Fourteen.

It appears that the lower courts are more interested in finding a way to shield the Respondents. Coupled with the conduct acted against the Petitioners, on January 11 , 1993 (when Petitioners attempted to amend their complaint to address the

additional tortious conduct acted against them).

On October 13, 1994, the Honorable Theodore Piatt issued Notice of Ruling of Ruling on Demurrer, in consolidated case No. KC 013366.

The Respondents Demurrer to the Petitioners' related action was sustained without leave to amend, based on Cal. Civ. Code § 47 **(See App. P. 27a)**

On page 3; line 16 of the Notice of Ruling, the court indicates to the Respondent that they should file a "demurrer which directs the Court to legal issues and/ or legal defects with the Complaint rather than the two-page motion filed July 12, 1994."

This wording directly demonstrates that the lower court will not fairly adjudicate matters correctly set before it, as on one hand they indicate that the Petitioners' Complaint was to long and rambling; however, the Respondents' demurrer was sustained even though the Respondent provided no points, authorities or facts to support their demurrer. (October 14, 1994 Ruling transcript can be provided).

It is probable that the said related matter will come before this Court for review, as the three lower courts have impressed the Petitioners with the fact that they are not interested in the Petitioners right to due process.

Unless the proceedings before respondent are overturned by order of this Court, Petitioner will sustain immediate and irreparable damage in that the Petitioners' will ultimately and finally be deprived of their rights to due process and a fair hearing of their matter, which is not the standard of this Honorable Court or the Constitution of the United States.

As a result of the Superior Court's, the Court of Appeal's and the California Supreme Court's rulings, the Petitioners will sustain irreparable injury, as this matter will be unconstitutionally and unjustly barred from being heard.

STATEMENT OF FACTS

On January 13, 1992, at approximately 5:10 p.m., Petitioner, Mrs. Ellington was operating her vehicle, southbound on Barranca Avenue, in the City of Covina, California; when she entered the intersection of Puente Street, a vehicle operated by Respondent, Robert Barber Stull attempted a left turn and collided with and into the vehicle operated by Mrs. Ellington.

When this matter was litigated (litigation was initiated March 92'), much evidence (photos of Respondent and Petitioner vehicles; police report including diagram of impact, Respondent's statement, Petitioners' statement, and witness Joseph Mitchell's statement; Nationwide's 50/50 liability letter Feb. 92' all within Clerk's Transcript and two other independent witnesses) was provided to substantiate liability.

However, the Respondents, Stull and Nationwide, and the Respondents, Richard P. Delatorre and John J. Walker, attorneys for Stull, and Douglas L. Bollinger, Claims Attorney for Nationwide Insurance, individually and in concert engineered facts which each knew to be false statements of material facts and issues(in direct contradiction to the evidence they had within their possession as early as Feb.92'), when they indicated that the said accident occurred after darkness, on January 13, 1992 and it was a head - on collision caused by Mrs. Ellington, when she violated the double - yellow dividing line, at the said intersection and forced the vehicle operated Stull backwards approximately two car lengths evidence by Mercury Insurance Group letter of Respondent Stull with re- presenting counsel present Michael Manning on March 23, 1992 (included in Clerk's Transcript page 000053).

The named Respondents chose to maintain that the said known false statements of material facts and issues were ground for defense and disputed liability.

On September 15, 1993 and October 15, 1993 Mandatory Settlement Conference, where negligence was settled and a verbal contract that the Appeal would

be held viable, the Respondents misrepresented the true limits and provisions of Respondent, Stull's insurance policy.

It is the Petitioners, Joy Elaine Ellington and Azariah Michael Ellington allegations that the Respondents have acted against the Petitioners in the form of Fraud, Abuse of Process, Intentional Interference with Business Advantage and Intentional Infliction of Emotional Distress; and, the said Respondents acted the said causes of action individually and in concert, and their efforts may mandate a Petition to Allow Complaint Against Attorneys for Civil Conspiracy with Client.

REASONS FOR GRANTING CERTIORARI

The Petitioners respectfully submit that they have raised the issue of "due process" within the Notice of Motion for Leave to Amend Complaint, (**see Appendix page 8a**), and is part of Clerk's Transcript, at page 1; filed with Opening Brief of Eight Points regarding "Abuse of Discretion", and such right to "due process" was further denied the Petitioners, by the Court of Appeal of the State of California, Second Appellate District, Division Four (depriving Petitioners of rights under U.S.C.A, Constitution, Amendments 1 and 14 and California Constitution, Article 1 § 1, Article 1 § 2 and Article 1 § 7), and such denial was joined and aided by the highest Court in the State of California.

This conduct come within the ambit of ground for granting Petitioners' request for Certiorari, ac- cording to **Supreme Court Rule 10.1(c) (see App. 9a)** as the State of California has not only failed to abide by the Constitution and laws of the State, but further acted against the Constitution and laws of the United States of America as indicated and held by this Honorable Court, as follows:

U.S.C.A., Constitution, Amendment 14;

Due Process, Supreme Court Rule 10.1(c)

Duares v. City of N.Y., C.A.2 (N.Y.) 1993, 985 F3d 94 (private individual subject to liability if willfully collaborated with state official in deprivation of federal right); **Hoai v. CADC** (1991) 935 F.2d 308 (joint activity requires overt and significant state participation); **NAACP v. Hunt** C.A.11 (Ala) (1990) 891 F.2d 1555 (private party conspire with state official right to sue); **Imbler v. Pachtman** 424 U.S. 409, 47 L.Ed 2d 128, at 145; 96 S.Ct. 984 (42 USC § 1983 is fundamentally one for "misuse of power"); **Steele v. Stephan** (1986) 633 F.Supp 950, 952 (complaint dismissed if it appears beyond a doubt no set of facts can support the claim); **U.S. v. Stanley** (1987) 107 S.Ct 3054, 3070-3071, 483 U.S. 669, 693-697 (not unfair to hold liable the official who knows he's acting outside the law); **Harlow v. Fitzgerald** (1982) 457 U.S. 800, at 817; 102 S. Ct. 2727, at 2738 (officials' conduct violate clearly established statutory of constitution rights); all in direct conflict with the Opinion of the Court of Appeals of the State of California (**see appendix page 9a, 10a, 11a, 12a**)

California Constitution, Amendment Art. 1 § 1 Inalienable Rights, and Art. 1 § 7 Due Process; Supreme Court Rule 10.1(c)

H & M Assoc. v. City of El Centro (1980) 167 Cal.Rptr. 392, 109 C.A. 3d 399 (pleading defendant knowingly and willfully conspired); **In Re Marilyn H.** (1993) 19 Cal.Rptr.2d 544; 5 Cal. 4th 295, 857 P.2d 825 (nature of due process); all in direct conflict with the Opinion of the Court of Appeals of the State of California (**see appendix page 12a**)

U.S.C.A. Constitution, Amendment 1

Freedom of Speech

State v. Monastero, 1988, 424 N.W.2d 837, 228 Neb. 818, appeal dismissed 109 S.Ct. 358, 488 U.S. 936, 102 L.Ed.2d 349 (not all speech is protected); **Farina v. U.S.**, D.C. App. 1993, 622 A.2d 50 (regulation of

conduct); **U.S. v. Riggs** N.D. Ill. 1990, 743 F.Supp. 556 (First Amendment does not protect criminal conduct); **Upchurch v. New York Times Co** S.C. 1993, 431 S.E.2d 558 (privilege speech does not automatically protect for action of intentional infliction of emotion distress); **Matter of Anderson** 1990, 795 P.2d 64, 247 Kan. 208, certiorari denied 111 S.Ct. 985, 498 U.S. 1095, 112 L.Ed.2d 1069 (professional misconduct has chilling effect on First Amendment rights); **Coleman v. Caddo Parish School Bd.**, La. App. 2 Cir. 1994, 635 So2d 1238 (speech is protected unless it present clear and present danger) ; **Underwager v. Salter** C.A.7 (Wis) 1994, 22 F.3d 730 ("actual malice" awareness of probable falsity); all in direct conflict with the Opinion of the Court of Appeal of the State of California (**see appendix 12a, 13a, 14a, 26a**)

California Constitution Art.1 § 2
Freedom of Speech

Fisher v. Larsen (1982)188 Cal.Rptr. 216, at 226, 138 C.A.3d 627, at 639 (reckless disregard for the truth); **Kupiec v. American Intern. Adjustment Co.** 235 Cal.App.3d 1329, 1 Cal.Rptr.2d 371 (Cal.Civ.Code §47 (b)(2) does not privilege tortious courses of conduct); **Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karma** Inc., et al., 42 Cal.3d 1159, 232 Cal.Rptr.567 (Cal. Civ Code § 47, subd. 2 does not preclude court from making evidentiary use of statements to determine improper "ulterior" purpose); **Kachig v. Boothe** 22 Cal.App3d 626, at 634, 99 Cal.Rptr.393, at 397 (expose perjury); all in direct conflict with the Opinion of the Court of Appeals of the State of California (**see appendix page 14a, 15a**)

California Civil Code of Procedure allowed for redress are as follows:

CCP § 473

"The court may, in furtherance of justice,

and on such terms as may be proper, allow a party to amend any pleading or PROCEEDING...THE court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, and amendment to any pleading or proceeding in other particulars...." (included in Motion for Leave to Amend Complaint **see appendix 8a**)

CCP § 30

A civil action is prosecuted by one party against another for the declaration, enforcement of protection of a right, or the redress or prevention of a wrong.(included in Reply to Defendants Opposition to Motion for Leave to Amend Complaint, in Clerk's transcript page 000160)

Petitioners' also pled the following cases in their Motion for Leave to Amend Complaint regarding "refusal to allow amendment would deprive the petitioner of the right citing **Hirsa v. Superior Court (Vickers)** (1981) 118 CA3d. 486, 173 Cal.Rptr. 418 and**Marasco v. Wadsworth** (1978) 21 C3d. 82, 146 Cal.Rptr. 843**(see appendix 8a3 and 26a)**

In the Petitioners Opening Brief cited Eight (8) California Statues and Forty-Eight (48) directing the Court of Appeals to "Due Process**Table of Authorities, see appendix 7a**) also, see **Parchment Co. v. Paterson P. Paper Co.** (1931) 282 U.S. at p. 564, 51 S.Ct. at p. 251, citing **Gilbert v. Kennedy** (1871) 22 Mich. 117, 130 **(see appendix 16a)**.

Finally, in accordance with Rule 10 1(c) **(see appendix 9a)** and Title 28 § 1257 by virtue of the wording, laws set forth herein**(see appendix 17a)** the Petitioners believe that the Honorable Justices of the United States of the Supreme Court will grant the Petitioners Writ to Certiorari based on the governing laws and facts set within this petition.

ARGUMENT

POINT I

PRIVILEGE FOR PUBLICATIONS OR

BROADCASTS MADE IN JUDICIAL PROCEEDINGS APPLIES ONLY TO COMMUNICATIVE ACTS AND DOES NOT PRIVILEGE TORTIOUS COURSES OF CONDUCT

The Petitioners now point out that the "privilege" the Respondents claim a right to will only cover them if in fact they can show that their acts were communicative only, as opposed to a course of conduct. For this, the Plaintiffs have clearly shown that the Defendants were aware that they would use known false statements of material facts and issues as ground for defense and disputed liability as evidenced before the Court of Appeals and the Supreme Court of California within the Clerk' s Transcript.

The Exhibits will show that the Respondents were aware that the insured and Client, Respondent, Stull had indicated on at least three separate occasions, that he attempted a left turn and collided with Petitioner, Joy E. Ellington

The Exhibits will show that the Respondents conspired to deprive the Petitioners of their rights and property, by purposefully and with reckless disregard for the truth, misrepresenting to the Superior Court known false statements of material facts and issues.

This sort of willful misconduct is criminal as well as tortious, and there is no privilege for tortious or criminal conduct, according to California State law, as indicated in **Kimmel v. Goland** (1990) 51 Cal.3d 202, 793 P.2d 524, 271 Cal.Rptr. 191 **(see appendix 17a)**

In the instant case, the Attorneys' conduct will certainly be a conflict of interest that might result in the Attorneys defending against their clients for breach of Penal Codes, Civil Codes and Business and Professional Code. Particularly because each of the Defendants were aware that they would set out to harm

the Plaintiffs and such conduct was reckless and willful, and the following case indicates how such conduct should be considered in relation to Civil Code Section 47**Fisher v. Larsen (1982)** 78 L.Ed2d 335, 464 U.S. 959, 138 C.A.3d 627, 188 Cal.Rptr. 216. **(see appendix 14a and 15a)**

This United States Supreme Court case bars the umbrella of the "absolute privilege" because of the reckless and wanton disregard of veracity, which is evidently and undisputedly set forth or evidence supra.

According to the California Supreme Court, the Respondents' "reckless and wanton" conduct has vitiated any right they may have had to any privilege; as their "course of conduct" and " reckless and wanton" conduct will not be protected by the privilege claimed, or any other privilege for the subject matter.

Further, a key element of the right to a privilege is that the act is "to achieve the objects of litigation", as indicated in **Kupiec v. AmericanIntern. Adjustment Co.** (1992) 235 C.A.3 1326, 1 Cal.Rptr.2d 371. **(see appendix 14a and 15a)**

The communicative aspects of the subject action are not privileged because they were not to achieve the objects of litigation, and they have no connection or logical relation to the action; as the Respondents engineered, conspired and acted the crime of perjury, then entered into the litigation with the intent to use the perjury and misrepresentations to knowingly harm the Petitioners, when they were fully aware that all evidence clearly revealed that they were acting perjury and willful misconduct against the Petitioners, as indicated within the "conclusion" language o**Kimmel v. Goland (1990)** 51 Cal.3d 204, 213; 271 Cal.Rptr. 191, (see **appendix 16a and 17a)**

Upon concluding the Kimmel matter, the Supreme Court of California expressed the abilities, duties and expectation of attorneys; with this, there is

no question that the Attorneys and Clients in the instant matter were fully aware of their harmful and intentional acts prior to, and at the time they initiated and maintained them **(See Kimmel Appendix 17a)**

Both the United States Supreme and the California Supreme Courts will not allow the "judicial proceeding" privilege for conduct which one knows is illegal, tortious and damaging, especially, when such conduct is acted by Attorneys who, by oath, pledge to uphold the law.

Additionally, if the Respondents had a right to the privilege (though they do not), the Petitioners would yet have a right to the use of the statements used in prior judicial proceeding to evidence the tort and crimes,as indicated in **Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karms, Inc. (1986)** 42 C.3d 1157, 232 Cal.Rptr. 567. **(see App.15a)**

In the instant action, the Petitioners have used evidence and statements from within this action to show the tortious and criminal conduct acted by the Respondents.

Particularly, the Petitioners have clearly stated that such incorporated" exhibits evidence the alleged acts, and "course of conduct" acted by the Respondents.

Subsequent to the Petitioner, Mrs. Ellington's, severe spinal surgery, the Petitioners requested by letter dated November 16, 1992, an advance payment to aid them in their demise (Clerk's Transcript p.000066), the Respondent, Insurer informed the Petitioners in letter dated January 1, 1993, that they would then offer them a "nuisance value" of $7,000.00 for their case (Clerk's Transcript p.000071), though the Respondents were aware that the Petitioners' property damage was equal to this amount, and this does not include the medical bills, loss of earning, future loss of earnings, and other losses. This information was before both the California Supreme and Appellate Courts.

The California authority, supra, in relation to the subject matter, as it points to the very conduct com- plained of by the Petitioners, i.e., the unfair settlement practices, the abuse of process, the intentional interference with business advantage, and the intentional infliction of emotional distress.

The "unfair settlement offer" alone is actionable in the State of California under **Insurance Code § 790** which appears at.

The Petitioners believe that this Honorable Court will not close its eyes to the evident fact, that at the very least, the statements and depositions of the three independent witnesses demonstrate a clearly definitive "course of conduct".

RULING OF COURT OF APPEAL OF THE STATE OF CALIFORNIA, SECOND APPELLATE DISTRICT, DIVISION FOUR.

(See Appendix 2a - 2a9)

Probably the most outstanding expression of that acted against the Petitioners, occurred at the Appellate Court level.

The Appellate Court argued that "the trial court's ruling will be disturbed only upon a showing of a " 'clear case of abuse' " [of discretion] and a mis- carriage of justice."(citing **Denham v. Superior Court** (1970) 2 Cal. 3d 557, 566; **California Casualty Gen. Ins. Co. v. Superior Court** (1985) 173 Cal.App.3d 274, 279 *see Opinion of Appellate Court, Appendix 2a6 and 2a7* **See appendix 18a and 19a** for entire citing which evidence a conspiracy of private party and state official.

Within the Petitioners' Brief to the Court of Appeal of the State of California, the Petitioners addressed eight (8) separate Points concerning the trial Court's abuse of discretion and miscarriage of justice. **(Petitioners' Brief to the Court of Appeal appears [in pertinent part] herein at Appendix 10a)**

Each of the Points indicated within the

Petitioners' Brief demonstrate that the Superior Court abused its discretion, particularly when one considers that in order to preserve the conduct of the Superior Court, the Court of Appeal had to ignore the facts of the subject matter, and the California Supreme Court acted as if nothing ever happened; by simply denying the Petitioners of their day in court.

The facts before the California Courts clearly demonstrated that the Respondents had conspired and engineered crimes and torts according to California State law and statutes, i.e. **Business and Professional Code § 6068, Civil Code § 3294, Code of Civil Procedure §§ 20, 30, 32, 379a, 473, 576, Penal Code §§ 9, 118, Insurance Code § 790**, and the *elements of malicious prosecution, intentional interference with business, intentional infliction of emotional distress, abuse of judicial process.* (set forth in Appellate Brief)

The Court of Appeals clearly demonstrates its bias towards the Petitioners (1) by failing to honor California State law which clearly governed concerning acts evidenced by communications, and (2) by acting as both judge and jury when accessing whether or not the Petitioners evidence was absolute, qualified, conditional or evidence which could not be considered privilege to any degree; considering the Clerk's Transcript which was before these California Courts which contained evidence and communications which evidence that the Respondents had conspired to deprive the Petitioners of their right to due process 3) by using it's power and authority to find law and reason for protection of the Respondents, but failed to justly apply law provided to the preservation of the Petitioners' rights. **(see Ap- pendix, Opinion of Appellate Court, at page 2a)**

Such conduct is also governed by **Raya v. Maryatt Industries (1993)** 829 F.Supp. 1169 *plaintiff's error to specify the basis for amendment is not ground to ;deny* **Jacobi v. Blocker, E.D.Va. (1994)** 153 F.R.D. 84 *leave to amend should be freely*

granted; **Dimuccio v. D'Ambra, M.D.Fla. 1991,** 779 F.Supp. 1318, *improper legal theory does not preclude recovery;* **Gallardo v. Board of County Com'rs, Kearny County Kan., D.Kan. 1994,** 857 F.Supp. 783, *statement of claim must give defendant fair notice;* also, **Professional Real Estate Investors v. Columbia Pictures,** (1993) 113 S.Ct. 1920, 1929, *genuine vs. sham pleadings.* **(please see Appendix 19a, 20a and 25a.)**

POINT II
THOSE ALLOWED THE PRIVILEGE MAY CLAIM THE PRIVILEGE FOR THEIR OWN STATEMENTS ONLY

If the Respondents had a right to the subject "privilege" they could not claim the privilege for statement made by others in the same judicial proceedings **(see App. 27a - 27a3)**

In the instant case there are three (3) independent witnesses who have been statementized and deposed concerning the facts and the evidence of this litigation. Each of these witnesses' statements and deposition corroborate the fact that the Respondents were aware that they were using know false statements of material facts and issues as reason for defense and disputed liability.

If the Respondents were allowed the subject privilege, it would not prevent the Petitioners from using the "911" report, the weather data report, the Police Report, the letter from Mr. Delatorre "secreted" to the Appellate Court, the Photographs of the subject vehicles, and the 3 independent witness depositions, just to name a few evidences.

Considering the concept of "abuse of discretion" , the Appellate Court further indicated that "Abuse of discretion will not be found unless the trial court " 'exceeds the bounds of reason, all of the circum- stances before it being considered. ' " ; citing **Denham v. Superior Court, supra**, 2 Cal. 3d at p. 566. **(2a6,7)**

One must wonder at the " court's discretion:" that would overlook that which evidences both crime and tort with all of the facts and evidence plainly before it(**Clerk's Transcript**). As the Superior Court reasoned against the Petitioners with **"nursery rhymes"**, the Court of Appeals used evasion as their vehicle against the Petitioners.

What "court's discretion" allows a crime and tort to be acted against a citizen of their State, when it is clear that others conspired and engineered conduct to deprive a citizen of his and her rights to due process.

What "court's discretion" forsakes the true concept of the law that it might effect some other and absurd result, to the harm of citizens of its State.

The Court of Appeal found law to represent to the Petitioners that an insurer could not be sued with the insured in the State of California, but within the very law cited to represent this defense for the Respondents, the wording is found which indicates that an insurer may be sued for its "own conduct", thus indicating how the California Court tended to represent this condition as final resolution, when in fact an unbiased Court would have indicated that the Petitioners yet retained the right against the Respondent insurer. For this "discretion" the Court of Appeal cited**Royal Globe Ins. Co. v. Superior Court** (1979) 23 Cal.3d 880, 891-892, overruled on other grounds in**Moradi-Shalal v. Fireman's Fund Ins. Companies** (1988) 46 Cal. 3d 287(**see Appendix 2a7**) **Spencer v. State Farm Mut. Auto. Ins. Co.** (1957) 152 Cal.App.2d 797.

The Court of Appeal used this law to surrep- titiously indicate that there was nothing the Petitioners could have against the insurer or the insured, particularly since they attempted to sue them in the same lawsuit, but no California law disallows a person from exercising his right against one who has wronged him, not even in California (when rightly applied) see

Moradi-Shalal v. Fireman's Fund Insurance Companies 46 Cal.3d 287 p.308,Cal.Rptr. 116 p.129 **(appendix page 16a).**

If the Court of Appeal was not bias towards the Petitioners it would have reached for the law concerning the Petitioners, as it sought diligently for law concerning the Respondents, by indicating that though the Petitioners may not be able to sue the insurer and the insured in the same action, they yet have a right to both, under proper procedure, which is also the law in California.

POINT III
MISREPRESENTATION REGARDING THE NATURE OF THE CLAIM COVERED RENDERS SUCH RELEASES VOID

The Court of Appeal indicated that by the authority of **Silberg v. Anderson** (1990) 50 Cal.3d 205, 211-212, 218, that "Even if perjury were a recognized civil cause of action (it is a crime under Penal Code §118), the conduct plaintiffs allege is ab- solutely privileged pursuant to Civil Code § 47 (b)."**(see Appellate Opinion, at Appendix 2a8 and 2a9, then Appendix 18a)** The Petitioners point out that the Silberg case, supra also provides for additional causes of action being brought within the present proceedings, which was done by the Petitioners.

Also, the Silberg case, points out that one may use privilege communications to evidence a tort or crime; the Petitioners are hurt by the fact that the Court of Appeal did not care how the Petitioners were harmed.

The Court of Appeal misrepresented that the Petitioners had "agreed not to allege intentional infliction of emotional distress, and that neither Nationwide nor Walker had anything to do with the collision or any claims arising therefrom." **(App. 2a6)**

Please review the Petitioners stipulation with the Respondents, which appears in Clerk's Transcript,

page 000133 For clarification, at the time of the subject stipulation, the Petitioners had "inadvertently" included Nationwide as a defendant within the original complaint, therefore, the Petitioners agreed to remove Nationwide as a defendant within the original complaint, and change the cause of action"infliction of emotional distress" to "negligent infliction of emotional distress", it is unknown how the Court of Appeal arrived at the language or interpretation inscribed in their ruling concerning this matter, but it certainly demonstrates a true lack of concern for the truth of this matter and the rights of the Petitioners.

At the MSC the nature of the subject release and dismissal, for "negligent" causes of action **only**, was that the Petitioners were relying upon the Court to verify the subject policy limits. When the Court confirmed that the Respondents had verified the policy limits to the Petitioners. The Petitioners accepted the Court's understanding of the policy, and the policy language as represented by Mr. Schaertel (friend of the Court).

After signing the dismissal and release, on October 15, 1993, and prepared by Respondent, the Petitioners discovered that the Respondents misrepresented the insurance policy, and the financial standing of Respondent, Mr. Stull.

The California Appellate Court had provided for such fraudulent situations in **Frusetta v. Hauben** (1990, 2nd Dist) 217 CA3d 551, 266 Cal.Rptr. 6[illegible] **(please see Appendix page 20a)**

The Mandatory Settlement Conference Transcripts, confirm that the Petitioners were relying upon the Courts interpretation of the subject insurance policy. Because the Respondents misrepresented to the Court, the Petitioners believed this misrepresentation and signed the dismissal and release.

Further, the Nationwide policy language made provisions for both bodily injury and loss of consortium

separately, which was denied to the Petitioners.

Please consider the following: **Evidence Code § 356** indicating matter may be elucidated, at **Appendix page 21a**.

Also, **Carson v. Facilities Development Co. (1984)** 36 C.3d 830, 206 Cal.Rptr. 136. **Sprague v. Equifax Inc. (App. 2 Dist. 1985)**166 C.A.3d 1012, 213 Cal.Rptr. 69. **(see Appendix page 21a.)**

POINT IV
WHAT CONSTITUTES PERJURY

> Conviction for perjury requires that accused have specific intent to make false statement under penalty of perjury; statement must be known by accused to be false at time it was made and must be willfully made.

West's Ann. Cal. Penal Code Section 118. - People v. Story (1985 2 Dist)168 C.A.3d 849, 216 Cal. Rptr. 158. **West's Ann. Cal.Penal Code Sections 118, 119, 127. -People v. Truer (1985)** 168 C.A. 3d 437, 214 Cal.Rptr. 869. **18 U.S.C.A. § 1621. - U.S. v. Clark (1990 Cal.)**918 F.2d 843. **West's Ann. Vehicle Code §§ 15, 22406, 40300, 40503. - Brown v. Superior Court (1965)** 234 C.A.2d 628, 44 Cal.Rptr. 519. **(please see Appendix pages 21a and 22a.)**

In the State of California it is a crime to knowingly lie orally, under penalty of perjury or under oath. Also, when a crime is committed, and sufficient evidence shows that a crime has been committed, a warrant for the suspects arrest is issued.

Though the Petitioners had mislabeled one of their causes of action "Perjury", the California Courts deprived the Petitioners of "due process" by recklessly avoiding the allegations set forth within the pleading, as opposed to the title of the pleading; clear direction was before the Court of Appeals and the California Supreme Court which directed in such circumstances, as indicated within the Petitioners' Brief, at page 23,

citing **Gagne v. Bertran** (1954) 43 C.2d 481; 275 P.2d 15 **(see Appendix 25a)** and **Kreutzer v. San Diego County** (1984) 153 CA3d 62; 100 Cal.Rptr. 322. **(see Appendix 26a)**

Had the State Courts considered the allegations within the causes of action, they would have found the pleadings alleged fraud, oppression, malice and d(see **Professional Real Estate Investors at page 24a and 25a of Appendix)**

The Respondents indicate in letter dated February 11, 1992 **(Clerk's Transcript p. 000021)** that "based on my (their) investigation, I (they) feel my (their) offer to you (us) of 50/50 settlement is appropriate." This letter was based on the fact that Nationwide's client, Mr. Stull had indicated to them that he attempted a left - turn and collided with Mrs. Ellington after darkness, on January 13, 1992.

But when the Respondents further discovered that the subject accident did not occur after darkness, they then indicated that Mrs. Ellington caused an accident with Mr. Stull by colliding "head - on" into Mr. Stull's vehicle after darkness, without headlights, forcing his automobile backwards approximately two (2) car lengths, thus indicating that Mrs. Ellington was 100% liable for the subject automobile accident.

This letter further aids to evidence that the Respondents concocted a crime and tort against the Plaintiffs, because, when after it was evident that their client, Mr. Stull was 100% liable for the subject automobile accident, they then used perjury and a tortious course of conduct by knowingly and intentionally forwarding known perjured statements through the judicial process, to knowingly and intentionally harm, afflict, vex, annoy, harass and deprive the Petitioners of their right to due process.

Considering the relatively light issues of the perjury cases, supra, the course of conduct which was acted against the Petitioners is very substantial.

Petitioners have clearly shown that the Respondents knowingly and intentionally conspired to lie, then used that lie to harm the Petitioners' good faith process, to interfere with Petitioners' business relations, to intentional inflict emotional harm upon the Petitioners, and to deprive the Petitioners of their right to due process.

A simple document is all that is necessary to demonstrate that perjury has been committed. The Petitioners have provided numerous documents and the deposition testimony of three (3) independent witnesses, which clearly show that prior to using the judicial process and during the maintenance of the same, the Respondents were aware of the criminal activity they had acted against the Petitioners **(a non-communicative course of conduct)**

What is amazing about all of this is the fact that the Petitioners would be in custody, or on probation at best, if they had committed these acts with even less evidence to support the facts.

The Respondents are not shielded by the subject "privilege" from the punishment and redress due for such a crime and tort, as indicated in the conclusion section of **Kimmel v. Goland, supra (Appendix pages 16a and 17a).**

The Petitioners are aware that the California State law has no precedence within the jurisdiction of the United States Supreme Court; but the Petitioners would respectfully request that this Honorable Court consider the fact that California failed the Petitioners by ruling in conflict of their own laws, as they relate to the subject matter, thus exposing the fact that the Petitioners were deprived of their right to due process under State and National laws indicated within,**Silberg v. Anderson (1990)** 50 Cal.3d. 205, 214; 266 Cal.Rptr.638, 643. **(see Appendix page 18a)**

The California Supreme Court clearly expresses and holds to the fact that a litigant should

address falsity and misrepresentations within the proceeding that "unending roundelay of litigation" might be averted.

On January 11, 1993 (within the subject litigation) the Petitioners attempted to address the obvious misrepresentations and the resulting additional, defendants and torts arising from the conduct of the Respondents, which is provided for by both statute and case law in the State of California. Particularly when such actions are timely brought within the proceedings.

Even if the Petitioners had erred in their presentation, the law yet remains to provide them the right to due process, as indicated within **Section 1983, Woodard v. Mennella, (EDNY 1994)** 861 F.Supp. 192 **Chambers v. Baltimore, etc. R. Co., (Ohio 1907)** 28 S.Ct. 34, 207 US 142, 52 L.Ed. 143. **(please see Appendix page 23a)**

The Petitioners are grateful for the rights provided by the State and the Nation, and until this action was filed in the Superior Court of California, Los Angeles County, the Petitioners had never filed a complaint.

What has horrified the Petitioners is the fact that a Court can have the clear interpretation of a law, and the fact that a matter is clearly protected by that or those laws and rights; but will act to deprive a person(s) of those laws, in direct contrast, and clear misapplication of those laws, with the knowledge of the harm such conduct would cause, even a breach of the constitutional rights of parties before it, expecting justice.

In the instant matter, the Petitioners have clearly shown that they have been operated against with the intent that they would be deprived, and the Petitioners were so deprived of their right to due process by public officials. Even Judges and Clerks of the lower Courts who joined with and furthered the conspiratory conduct of the Respondents, who had

joined to deprive the Petitioners of their right to due process, and such gives rise to a conspiracy claim within the jurisdiction of this Honorable Court, as follows:

> A § 1983 conspiracy claim may arise when a private actor conspires with a state actor to deprive a person of a constitutional right under color of state law. **Dixon v. City of Lawton, Okl., C.A.10 (Okl. 1990)** 898 F.2d. 1443.

Petitioners allege that the lower Courts acted in concert with the Respondents to aid in furthering their conspiracy against the Petitioners, when the lower Courts were aware of the laws which provided relief for the Petitioners, but acted to wresi these laws to further the interest of the Respondents, in direct and reckless disregard for the rights of the Petitioners.

Considering the concept of justice, the injustice, and joining of the lower Courts to further the unconstitutional act of the Respondents, one can clearly discern the bias of the lower Courts, as indicated within **Concrete Pipe & Prod. v. Const. Laborers Pen. Tr. (1993)**113 S.Ct. 2254, 2277.**(Appendix page 23a)**

Considering the amount of case law and statutes to govern the lower Courts conduct and decisions, it is clear to see that justice was not the root of their ruling, but the very laws written and maintained by these Courts were bypassed and wrested that some absurd result would arise to the deprivation of the Petitioners.

This entire issue was birthed out of a Motion for Leave to Amend a Complaint. And for obviously bias reasons the lower Courts acted in direct and wanton disregard for the law set to govern in such matters, particularly worded within **Zinermon v. Burch** 494 U.S. 126; 110 S.Ct. 984. **(see Appendix page 22a)**

In the instant matter, there was no hearing, only "nursery rhymes" quoted by the Superior Court

Judge, indicating "Liar liar pants on fire, you just can't do that." (see appendix page 5a and 5a1.)

The Appellate Court originally indicated, at the hearing that the Petitioners would not be deprived of their rights, but subsequently changed their ruling, quoting the very law which provided the Petitioners a right to redress (Silberg v. Anderson, supra.)

When this Honorable Court review the transcripts and briefs from the lower Courts, it will find law regarding right to amend complaint citing **Herrera v. Superior Court (1984)** 158 Cal. App.3d. 255; 204 Cal.Rptr. 553, 556 **Olson v. Hart, C.A.10 (Kan.) 1992** 965 F2d. 940. **(please see Appendix pages 23a and 24a.)**

And "spite" from the lower Court is very evident when one considers the Remittitur Notice of the Court of Appeal of the State of California, Second Appellate District, Division Four, which appears at page 12a of Appendix herein. Therein the California Court of Appeal awarded cost to the Respondent, though the Court of Appeals is aware that cost are for frivolous appeals, and it would be interesting to have the Court Appeal prove frivolity concerning the Petitioners' appeal according to **Professional Real Estate Investors, Inc., et al. v. Columbia Pictures Industries Inc., et al** (1992) 113 S.Ct. 1920, 1922, 1929, or **Bartkus v. Illinois** 359 U.S. 121, 79 S.Ct. 676. **(please Appendix pages 24a and 25a)**

Considering the fact that the Petitioners brought their amended complaint within the proceeding, and the fact that a stay was in place for the same, the lower Courts acted with bias and reckless disregard to further the Respondents intentions and deprive the Petitioners, and did so deprive the Petitioners, indicated within **In re Marriage of Horowitz** (App. 1 Dist. 1984) 159 C.A.3d 377; 205 Cal.Rptr. 880; **at App. page 24a**.

Petitioners now request stay of the cost of proceedings provided against them from the California

Court of Appeal according t**American Manufacturers Mutual insurance Co. et al vAmerican Broadcasting - Paramount Theatres, Inc.** (1966) 87 S.Ct. 1, 2,3. **(please see Appendix page 24a)**

When the Petitioners appeared before the Mandatory Settlement Judge, the only matter before that Court was the negligence aspect only, and the related parties agreed that the Appeal for additional defendants and causes of action were yet viable, and the only aspect to be settled was the negligence aspect only, as was indicated and understood by all parties, including the Appellate Court (see Appendix Opinion page 2a and 2a6, footnote 1).

CONCLUSION

In that the lower Courts applied the "litigation privilege as ground to bar the Petitioners from their Constitutional Right to Due Process, the Petitioners request that this Honorable Court address the obvious absurd results effected by the intentional and reckless misinterpretation of the litigation privilege.

The litigation privilege obviously allows the unscrupulous litigant to cause considerable harm to others, while the Justice System looks on, indicating that there is nothing that can be done to avert the obvious criminal and tortious activity.

Surely, the intelligencia of our Nation can see that this privilege simply attracts criminal conduct from those who would fear to tread such areas, if proper and distinct wording was set forth to direct the legislative intent to protect the public as a whole.

Considering the millions of dollars spent litigating such matters (millions of dollars represent those who have the ways and means to address these matters nationally, but there is no consideration for those who have suffered great harm and losses within this area, and silenced by the default which results from

"lack of ability to continue."), and the ever increasing misuse of the privilege, the public is now positioned to witness the erosion of our Justice System; because, now, at the very core of Justice is the conduit for evil, and if one might expect only a few to misuse this privilege, then one should consider that there is no need for any law at all, as only a few would consider violations against their fellows.

Also the litigation privilege has been spoken on and interpreted to protect the innocent witness and litigation participant, but there is no language provided for the protection of the innocent victims, as well as the resulting harm to the innocent victims.

Within the State of California, Police Officers will enter the private residence and property of the Citizens of the State, take that Citizen's property, and charge that Citizen with theft.

When the Citizen arrives at the impounding Officer's place of business to provide proof of ownership, the impounding Officer will deny the Citizen the right to show proof of ownership.

According to California State law, a hearing must be had to determine proof of ownership, but the impounding Officer will further deprive the Citizen, by swearing out a false report to obtain a warrant for the Citizen's arrest, that the Citizen will be deprived of the hearing to show proof of ownership.

The Officer is aided in this conduct by District Attorneys, Public Defenders and Judges ***(who would rather the Citizen stand trial with the receipts to his property within his possession).*** These Judicial Officers may be immuned from redress for their conduct, but the Citizen must suffer a life of anguish. **(Los Angeles Superior Court, Norwalk # VA027889)**

ADOLF HITLER would be thrilled with the justice provided in the State of California.

WHEREFORE, Petitioners respectfully request that this Honorable Court instruct the lower courts to abide by the very laws set forth in California and those of the United States.

1. That a writ of certiorari issue under the seal of this Honorable Court commanding respondent to certify fully to this court, at a specified time and place, a transcript of the record and proceedings describe above.

2. That the forgoing cause be heard and fully considered by this Court and that the disposition of the Petition for Writ of Review filed on December 21, 1994, by the Honorable Chief Justice Lucas of the Supreme Court of the State of California; also the disposition of Appeal filed on October 17, 1994, and the Remittitur Notice filed on January 24, 1995, by the Honorable Acting Presiding and Associate Judges of the California Court Appeal, Second Appellate District, Division Four, be annulled and set aside;

3. For recovery of costs incurred in this proceeding; and

4. For such other and further relief as the court may deem proper.

Dated:

/ Respectfully submitted,

Azariah M. Ellington
In Pro Per

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Second Appellate District, Division Four, No. Bo73682
S043368

IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

IN BANK

JOY ELAINE ELLINGTON Et Al., Petitioners

v.

LOS ANGELES COUNTY SUPERIOR COURT, Respondent

ROBERT BARBER STULL Et Al., Real Parties In Interest

Petition for review DENIED.

Chief Justice

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

DIVISION FOUR

JOY ELAINE ELLINGTON et al., No. B073682

Petitioners, (Super.Ct. No.KC009085)

(Gregory C. O'Brien, Jr., Judge)

v.

THE SUPERIOR COURT OF
LOS ANGELES COUNTY,

Respondents;

ROBERT BARBER STULL et al.,
Real Parties in Interest

ORIGINAL PROCEEDING from a judgment of the Superior Court of Los Angeles County. Being treated as writ of mandate. Denied.

Joy Elaine Ellington and Azariah Michael Ellington, in pro per., for Petitioners.

No appearance for Respondent.

Law Offices of Charles Crismier III, Michael E. Maning, Bakken and Koester, Richard P. Delatorre, Hawkins, Schnable, Lindahl & Beck and Patrick T. Barrera for Real Parties in Interest.

STATEMENT OF THE CASE

Plaintiffs appeal from the trial court's order denying their motion to amend their complaint adding defendants and causes of action. Ultimately plaintiffs settled their case against the original defendant and filed a request for dismissal of the entire action. An order of dismissal was was entered by the court on February 16, 1994. Although plaintiffs appeal from a nonappealable order, was shall treat the appeal as a petition for writ of mandate and decide the case.

(California Dental Assn. v. California Dental Hygienists' Assn. (1990) 222 Cal.App.3d 49.)

FACTUAL AND PROCEDURAL HISTORY

Plaintiff Joy Ellington wa injured in an automobile accident with defendant Robert Stull on January 13, 1992. She and her husband, Plaintiff Azariah Ellington, engaged in negotiations with defendant Stull's insurance carrier, Nationwide Mutual Insurance Co.

Plaintiffs commenced this action by filing in propria persona a Judicial Council form personal injury complaint on

March 23, 1992, against the driver of the other vehicle, Robert Stull and his insurance carrier, Nationwide Mutual Insurance Co. The complaint contained four causes of action against both Stull and Nationwide for property damage, personal injury, "infliction of emotional distress" and loss of consortium. Plaintiffs alleged that Stull was negligent and caused the collision, which resulted in Joy Ellington suffering personal injuries and the Nationwide inflicted emotional distress by contending Joy Ellington was contributorily negligent.

Defendants demurred to the complaint on May 18, 1992. The parties engaged in correspondence about the pleadings. As a result of these negotiations, plaintiffs and defendants stipulated that plaintiff would file and amended complaint, naming as defendants Stull and Does 1 through 10, deleting Nationwide Mutual Insurance as defendant, and clarifying that their infliction of emotional distress cause of action was for negligent infliction of emotional distress. Defendant Stull demurred to the amended complaint. The

demurrer was set for hearing on July 16, 1992. The record contains an undated stipulation signed by the Ellingtons and John Walker, attorney for Stull, with respect to the filing of an amended complaint, which defendant Stull would answer. A "Second Amended Complaint", dated July 5, 1992, was filed and served by mail on Defendant Stull's attorney on August to plaintiffs' second-amended complaint, which contains a general denial and eight affirmative defenses.

Thereafter the parties apparently engaged in settlement negotiations and discovery. On December 17, 1992, plaintiffs filed a motion for leave to file a third amended complaint, which was set for hearing on January 11, 1993. The proposed third amended complaint added as parties the lawyer who represented defendant Stull, John Walker; the lawyer who represented defendant Stull, John Walker; the lawyer who represented Stull as cross-complainant, Michael Manning (although the record contains no cross-complaint). Nationwide Mutual Insurance Co., plus Does 1 through 3. Plaintiffs added a fourth cause of action for intentional

infliction of emotional distress and a fifth cause of action for perjury. Plaintiffs' three children are added as plaintiffs in the second cause of action for loss of consortium and the third cause of action for negligent infliction for emotional distress. Finally, the prayer seeks punitive damages. The reasons stated in plaintiffs' declaration supporting the motion were that defendant Stull, his insurance company, and his lawyers all participated in a scheme to have defendant Stull commit perjury in order to defeat plaintiffs' claims.

Defendant Stull, Nationwide Mutual Insurance Co., and attorney John Walker together filed an "opposition" to plaintiffs' motion for leave to file an amended complaint, contending, inter alia, there is no cause of action for perjury, that plaintiffs previously agreed not to allege intentional infliction of emotional distress, and that neither Nationwide nor Walker had anything to do with the collision or any claims arising therefrom.

There are two filings opposing the plaintiffs' motion for leave to amend -- one filed on behalf of "Defendant Robert

Stull", by Bakken and Koester, and another on behalf of "Defendant and cross-complainant" Robert Barber Stull filed by Michael Manning, a proposed defendant in the third amended complaint, of the law offices of Charles Crismier III. Plaintiffs filed a reply to the "oppositions". The trial court denied the motion to file a third amended complaint at the hearing held on January 11, 1993. From the order denying their motion, plaintiffs filed their notice of appeal on February 4, 1993.

The case was arbitrated; plaintiffs requested trial de novo; the case was set for trial on September 29, 1993 and for mandatory settlement conference on September 15, 1993. At that settlement conference, plaintiffs agreed to accept defendant Stull's $50,000 insurance policy limits plus additional amount for property damage. Subsequently, they raised questions about the loss of consortium claim and whether it would afford additional insurance policy proceeds; the trial court brought the matter before it for further hearing on October 15, 1993, at which time plaintiffs settled their

personal injury claims against Stull for $50,000 plus $5,000 for property damage. They preserved their claims against the additional defendants proposed to be added in their third amended complaint, the subject of this mandate petition.1/

DISCUSSION

The test for determining if the trial court correctly decided the motion to amend the complaint is whether abuse of discretion is shown. The trial court's ruling will be disturbed only upon a showing of a "'clear case of abuse'" [of discretion] and a "miscarriage of justice." (Denham v. Superior Court (1970) 2 Cal.3d557, 566; California Casualty Gen. Ins. Co. v. Superior Court (1985) 173 Cal.App.3d 274, 279.)

---

1. On October 15, 1993, plaintiffs signed a request for dismissal of the entire action with prejudice. The request for dismissal wa ordered entered in the record on February 16, 1994. At oral argument, plaintiffs asserted they intended to dismiss defendant Stull only, having reserved their rights to proceed against the other proposed defendants both at the mandatory settlement conference and in the release document they signed. Plaintiffs also asserted the dismissal request form was prepared by defendant Stull's attorneys. While we are mindful of the fact that the trial court may have no further subject matter or personal jurisdiction over the parties once the voluntary dismissal is filed. (Harris v. Billings (1993) 16 Cal.App4th 1396, 1405), plaintiffs filed and perfected their "appeal" with this court prior to

dismissal. Thus, this court has jurisdiction to decide the matter. Abuse of discretion will not be found unless the trial court "'exceeds the bounds of reason, all of the circumstances before it being considered.'" (Denham v. Superior Court, supra, 2 Cal.3d at p. 566.)

We conclude the trial court did not abuse its discretion in denying plaintiffs' motion to file their third amended complaint.

With respect to the proposed addition of defendant Stull's insurance carrier, Nationwide Mutual Insurance Co., it has long been the rule in California that the injured plaintiff cannot join the insured tortfeasor's insurance carrier in the same action. (See Royal Globe Ins. Co. v. Superior Court (1979) 23 Cal.3d 880, 891-892, overruled on other grounds in Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287; Spencer v. State Farm Mut. Auto. Ins. Co. (1957) 152 Cal.App.2d 797.) The essence of the emotional distress claim arises out of the conduct of the defense of plaintiffs' lawsuit. Even a separate action may not be brought against the tortfeasor's insurance carrier on these facts. (See

Moradi-Shalal v. Fireman's Fund Ins. Companies (1988) 46 Cal.3d 287.)

Plaintiffs also sought to add their children as plaintiffs seeking loss of consortium. This cause of action is available only to spouses. (Elden v. Sheldon (1988) 46 Cal.3d 441, 446.) The children were not present at the scene of the accident. Since they had no contemporaneous awareness of any harm which their mother suffered, neither may they allege a cause of action for negligent infliction of emotional distress. (Thing v. La Chusa (1989) 48 Cal.3d 644.)

Finally, plaintiffs sought to add a cause of action for "perjury" against the insurance carrier and defendant Stull's attorneys, John Walker and Michael Manning. This claim is based on plaintiffs' contention that the insurance company, defendant Stull, and his lawyers conspired to have him lie about the facts of the collision in response to discovery propounded by plaintiffs. Even if perjury were a recognized civil cause of action (it is a crime under Penal Code, § 118), the conduct plaintiffs allege is absolutely privileged pursuant

to Civil Code section 47 (b). (Silberg v. Anderson (1990) 50 Cal.3d 205, 211-212, 218.) Thus plaintiffs may not sue the insurance carrier or defendant Stull's lawyers, either in this case or in a separate action, for the conduct alleged in the proposed cause of action for perjury.

DISPOSITION

The petition for writ of mandate is denied.
NOT TO BE PUBLISHED

NEWMAN, J.*

We concur:

VOGEL (C.S.), Acting P. J.

HASTINGS, J.

*Assigned by the Chairperson of the Judicial Council.

COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOR THE SECOND APPELLATE DISTRICT

DIVISION: 4

Azariah Ellington
18470 Bellefont Drive

Azusa, CA. 91702

RE: Ellington, Joy E.
vs.
Stull, Robet B.
2 Civil B073682
Los Angeles NO. KC009085

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 10/17/94 is now final.

* * Petition Summarily Denied By Opinion * *

Respondent To Recover Costs.

JOSEPH A. LANE, Clerk
By: R. Mayfarth
Deputy Clerk

RICHARD P. DELATORRE BAR NO. 110563
BAKKEN AND KOESTER
701 North Haven Avenue, Suite 230-A
Ontario, CA 91764-4903
Telephone: (714) 466-6977

Attorneys for Defendant,
ROBERT BARBER STULL

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF LOS ANGELES, EAST DISTRICT

JOY ELAINE ELLINGTON AND AZARIAH MICHAEL ELLINGTON — CASE NO. KC009085

Plaintiffs,

vs.

ROBERT BARBER STULL and Does 1 through 10, Inclusive,

Defendants.

Notice of Ruling

TO ALL PARTIES AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that Plaintiffs Motion for Leave to File a Third Amended Complaint came before the Honorable Judge Gregory O'Brien in Department G of the East District, county of Los Angeles Superior Court at 8:30 a.m. on Monday, January 11, 1993. Plaintiffs Motion was denied.

Dated: January 14, 1993 BAKKEN AND KOESTER

RICHARD P. DELATORRE

SUPERIOR COURT OF THE STATE OF CALIFORNIA

FOR THE COUNTY OF LOS ANGELES

DEPARTMENT G HON. GREGORY C. O'BRIEN JUDGE

JOY ELAINE ELLINGTON, ET. AL.,

PLAINTIFF,

VS. NO. KC009085

ROBERT BARBER STULL, ET.AL.,

DEFENDANT.

REPORTER'S TRANSCRIPT OF

COURT PROCEEDINGS

MONDAY, JANUARY 11, 1993

APPEARANCES:

FOR THE PLAINTIFF: AZARIAH AND JOY ELLINGTON
IN PROPRIA PERSONA
18470 BELLEFONT DRIVE
AZUSA, CALIF. 91702

FOR THE DEFENDANT: BAKKEN & KOESTER
ATTORNEY AT LAW
BY: MR. RICHARD P. DELATORRE
701 N. HAVEN AVE., STE. 230-A
ONTARIO, CALIF. 97164

FOR THE CROSS-DEFENDANT ELLINGTON: HILL, GENSON, EVEN, CRANDALL & WADE
ATTORNEYS AT LAW
BY: MR. MARC W. HAWKINS
3401 CENTRELAKE DRIVE, #650
ONTARIO, CALIF. 91764

FOR THE DEFENDANT AND CROSS-DEFENDANT: CHARLES CRISMIER III
ATTORNEY AT LAW
BY: MR. MICHAEL MANNING
424 N. LAKE AVE., SUITE 304
PASADENA, CALIF. 91101

REPORTER: LYNN A. BARBSCH, C.S.R. 2457
OFFICIAL REPORTER

MR. ELLINGTON: MR. – I DON'T MEAN TO BE TEDIOUS, YOUR HONOR, IF YOU JUST BEAR WITH ME FOR A MOMENT, IF WITHIN A DEPOSITION UNDER THE PENALTY OF PERJURY –

THE COURT: UH-HUH.

MR. ELLINGTON: AND THEIR ATTITUDE, THE EVIDENCE HAS BEFORE THE INDIVIDUALS AND THEY CHOOSE TO –

THE COURT: MR. ELLINGTON, IF YOU FEEL SOMEBODY IS LYING IN THE COURSE OF A DEPOSITION, AND THE CASE RESOLVES ITSELF BEFORE TRIAL AND YOU REALLY THINK THE DISTRICT ATTORNEY WOULD BE INTERESTED IN DOING SOMETHING ABOUT THAT, YOU MAY TALK TO THE DISTRICT ATTORNEY.

FRANKLY IT'S MY EXPERIENCE THAT YOU'RE PROBABLY NOT GOING TO GET VERY FAR WITH THAT, BUT I'M NOT GOING TO – I'M NOT GOING TO MAKE A PROSECUTORIAL DECISION, THAT'S NOT MY FUNCTION.

IF YOU THINK THEY'RE TELLING A LIE, AND THEY TELL IT AGAIN ON THE WITNESS STAND, YOU CAN POINT OUT TO THE JURY. "LADIES AND GENTLEMEN OF THE JURY, THESE PEOPLE ARE LYING." OBVIOUSLY BUT YOU DON'T FILE AND AMENDED COMPLAINT SAYING, **"LIAR, LIAR, PANTS ON FIRE."** OKAY? YOU JUST DON'T DO THAT.

OKAY. MR. AND MRS. ELLINGTON, I'M GOING TO DENY YOUR MOTION TO FILE YOUR AMENDED COMPLAINT AND COUNSEL, WHO'S GOING TO GIVE NOTICE? MR. DELATORRE?

MR. MANNING: I'D BEEN HAPPY TO.

THE COURT: MR. MANNING.

MR. DELATORRE: I'LL GIVE NOTICE REGARDING THE REQUEST FOR FEES, YOUR HONOR.

2nd Civil No. B073682
Superior Court No. KC 009085
(Hon. Gregory C. O'Brien, Judge)

IMMEDIATE STAY REQUESTED
TRIAL DATE: SEPTEMBER 29, 1993

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION _____

JOY ELAINE ELLINGTON
AZARIAH MICHAEL ELLINGTON
CIVIL NO. B073682

Plaintiffs and Appellants,

vs.

ROBERT BARBER STULL and
Does 1 through 10 inclusive,

Defendants and Respondents.

APPELLANTS' OPENING BRIEF

On Appeal from the Judgment of the Superior Court of California, Los Angeles County

JOY ELAINE ELLINGTON
AZARIAH MICHAEL ELLINGTON
18470 Bellefont Drive
Azusa, California 91702
(818) 339-8348
Appellants
IN PROPRIA PERSONA

INDEX

	Page No.
Statement of Case	1
Nature of Action	1
Summary of Facts	1 - 5
Argument	5
Point I THE TRIAL COURT ABUSED DISCRETION WHEN IT DID NOT ALLOW PLAINTIFFS TO AMEND COMPLAINT TO JOIN MINOR CHILDREN AS CO-PLAINTIFFS TO THE INSTANT ACTION	5 - 7
Point II THE TRIAL COURT ABUSE DISCRETION WHEN IT DID NOT ALLOW PLAINTIFF TO AMEND THEIR COMPLAINT TO JOIN OTHER DEFENDANTS WHO MAY BE LIABLE TO PLAINTIFFS	7 - 9
Point III TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFFS' MOTION TO AMEND BASED ON COMPLAINT'S FAILURE TO STATE FACTS SUFFICIENT TO CONSTITUTE A CAUSE OF ACTION	9 - 11
Point IV TRIAL COURT ABUSED JUDICIAL DISCRETION WHEN DENYING PLAINTIFFS' MOTION TO AMEND, BASED ON INEXCUSABLE DELAY AND PREJUDICE TO THE OPPOSING PARTY	11 - 13
Point V TRIAL COURT ABUSED ITS DISCRETION IN DENYING LEAVE TO AMEND COMPLAINT WHEN PLAINTIFFS HAVE STATED MERITORIOUS CAUSES OF ACTION	13 - 16
Point VI TRIAL COURT ABUSED ITS DISCRETION BY NOT ALLOWING PLAINTIFFS TO AMEND THEIR COMPLAINT TO STATE A CAUSE OF ACTION FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS	17 - 20
Point VII TRIAL COURT ABUSED ITS DISCRETION WHEN IT DENIED PLAINTIFFS' AMENDED COMPLAINT FOR THE CAUSE OF ACTION FOR PERJURY	20 - 23

INDEX
(continued)

		Page No.
Point VIII	TRIAL COURT ABUSED ITS DISCRETION IN DENYING PLAINTIFFS MOTION TO AMEND, INDICATING THAT THERE IS NO CIVIL REMEDY FOR CRIMINAL ACTIVITY AND IF SO PLAINTIFFS MUST WAIT UNTIL TRIAL TO SEEK SUCH REMEDY	24 - 35
Conclusion		37

TABLE OF AUTHORITIES

California Statues: Page No.

Code of Civil Procedure, section 378..... 6

Code of Civil Procedure, section 576..... 7

Code of Civil Procedure, section 379..... 9

Business & Professional Code, section 6068.....18

Penal Code, section 9 27

Penal Code, section 118.....28

Cases:

Estate of Hunter, 194 Cal.App.2d 849, 865,

15 Cal.Rptr. 556 7

California Cas. Gen. Ins. Co. (1985) 173 Cal.App. 3d 274,

218 Cal.Rptr. 817..... 9,11,25

Avedissian v. Manukian (1983) 141 Cal.App.3d 379, 383,

190 Cal.Rptr. 291..... 12

Higgins v. Van R. Dental Prod., Inc. (1981) 123 Cal. App.3d 558, 176 Cal.Rptr. 704, 708..... 13, 22

Binning, Inc. v. Safeco Ins. Co (1977) 74 Cal.App.3d

617, 141 Cal.Rptr. 547, 548..... 15

Murphy v Allstate Ins. Co., 17 Cal.3d 937, 941,

132 Cal.Rptr. 424..... 15

Roberts v. Ball, Hunt, Hart, Brown & Baerwitz, 57 Cal. App.3d 104, 109, 128 Cal.Rptr. 901, 905..... 16

Doctor's Co. Ins. Services v. Superior Court (1990) 225 Cal.App.3d 1284, 275 Cal.Rptr. 674..... 17

Weiner v. Fireman's Fund Ins. Co. (1991) 91 Daily Journal D.A.R. 8837..... 18

TABLE OF AUTHORITIES
(CONT.)

Cases:

Cervantez v. J. C. Penny Co. (1979) 24 Cal.3d 579, 593 18

Wolfrich Corp. v. United Services Auto Ass'n (1983) 149 Cal. App.3d 1211, 197 Cal.Rptr. 392..... 19

Wyatt v. Union Mortgage Co. (1979) 24 Cal.3d 773, 777, 784, 157 Cal.Rptr. 392..... 19

Unruh v. Truck Ins. Exchange (1972) 7 Cal.3d 616, 681, 102 Cal.Rptr. 815..... 19

Black v. Sullivan, 48 Cal.App.3d 566-567, 122 Cal.Rptr. 119..... 20

Burke v. Compania Mexicana De Aviacion (1970) 433 F.2d 1031, 1033, 1034..... 21

Wyndotte v. Transportation Co. v. United States (1967) 389 U. S. 191, 88 S.Ct. 379, 19 L.Ed.2d 407..... 21

J.I. Case Co. v. Borak (1964) 377 U.S. 426, 84 S.Ct. 1555, 12 L.Ed.2d 423..... 21

Texas & Pacific R. Co. v. Rigsby (1916) 241 U.S. 33, 36 S. Ct. 482, 60 L.Ed 874..... 21

MacIsaac v. Pozzo, 26 Cal.2d 809, 161 P.2d 449.... 22

Herrera v. Lisnek (1984) 158 Cal.App.3d 255, 204 Cal.Rptr. 553, 556..... 22, 23

Klopstock v. Superior Court (1941) 17 Cal.2d 13, 19 20, 108 P.2d 906..... 22

TABLE OF AUTHORITIES
(CONT.)

Cases: Page No.

Densy v. Wilder (1956) 46 Cal.2d 715, 751, 299 P.2d 257 22

Wells v. Lloyd IV (1936) 6 Cal.2d 70, 88, 56 P.2d 517 23

Gagne v. Bertran (1954) 43 C.2d 481, 275 P.2d 15 23

Kreutzer v. San Diego County (1984) 153 Cal.App.3d 62, 100 Cal.Rptr. 322 23

Peterson v. Peterson (1946) 74 Cal.App.2d 312, 168 P.2d 358 26

Crouser v. Boice (1942) 51 Cal.App.2d 198, 124 P.2d 358 26

Merlino v. West Coast Macaroni Mfg. Co. (1949) 90 Cal.App.2d 106, 202 P.2d 748 26

Hicks v. Sanders (1940) 40 Cal.App.2d 211, 104 P.2d 549 26

Bundy v. Maginess (1888) 76 C. 532, 18 P. 773 ... 27

Wilson v. Middleton (1852) 2 C. 54 27

Fenelon v. Superior Court (1990) 223 Cal.App.3d 1476, 273 Cal.Rptr. 367, 368-371 ..... 27, 28

Laczko v. Jules Meyers, Inc. (1969) 276 Cal.App.2d 293, 80 Cal.Rptr. 798, 799 29

Hudson v. Craft, 33 Cal.2d 654, 660, 204 P.2d 1, 7 A.L.R.2d 696 29

Biakanja v. Irving, 49 Cal.2d 647, 651,
320 P.2d 16, 64 A.L.R.2d 1358..... 29

Wetherton v. Growers Farm Labor Ass'n, 275 A.C.A. 188,
194, 79 Cal.Rptr. 543..... 29

Mc Ivor v. Mercer-Fraser Co., 76 Cal.App.2d 247,
253 - 254, 172 P.2d 758..... 29

Agnew v. Parks (1959) 172 Cal.App.2d 756,
343 P.2d 118..... 29, 31

Taylor v. Bidwell, 65 Cal. 489, 4 P. 491..... 30

Mox Incorporated v. Woods, 202 Cal. 675,
262 P. 302..... 30

Smith v. Superior Court (1984) 151 Cal.App.3d 491
198 Cal.Rptr. 829, 832..... 30, 34

Parchment Co. v. Paterson P. Paper Co. (1931)
282 U.S. 564, 51 S.Ct. 251..... 33

Gilbert v. Kennedy (1871) 22 Mich. 117, 130..... 33

Buckaloo v. Johnson (1975) 14 Cal.3d 815, 822 - 823,
122 Cal.Rptr. 745, 537 P.2d 865..... 34

Lowell v. Mother's Cake & Cookie Co. (1978)
79 Cal.App.3d 13, 17, 144 Cal.Rptr. 664..... 34

Asia Investment Co. v. Borowski (1982)
133 Cal.App.3d 832, 840 - 841, 184 Cal.Rptr. 42..... 34

Worldwide Commerce, Inc. v. Fruehauf Corp. (1978)
84 Cal.App.3d 803, 811, 149 Cal.Rptr. 42..... 34

Howard v. Superior Court (1992) 2 C.A.4th 745, 3
Cal.Rptr.2d 575, 577..... 36

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IN PRO PER

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES

JOY ELAINE ELLINGTON, and AZARIAH MICHAEL ELLINGTON
Plaintiffs,
vs.
ROBERT BARBER STULL, and Does 1 through 10, inclusive
Defendants.

CASE NO: KC 009085
NOTICE OF MOTION FOR LEAVE TO FILE AMENDED COMPLAINT: DECLARATION AND POINTS AND AUTHORITIES IN SUPPORT
DATE: JANUARY 11, 1993
TIME: 8:30 a.m.
DEPT: G
TRIAL DATE: NONE

TO EACH PARTY AND ATTORNEY OF RECORD IN THIS ACTION:

PLEASE TAKE NOTICE THAT on January 11, 1993, at 8:30 a.m., or as soon thereafter as counsel can be heard, Plaintiffs JOY ELAINE ELLINGTON and AZARIAH MICHAEL ELLINGTON will move this court in Department "G" thereof, at the above entitle Court, located at 400 East Civic Center Plaza, Pomona, California, for an order permitting Plaintiffs to file an amended complaint, which is attached hereto and a copy of which is served herewith.

This motion will be made upon the ground that it is in furtherance of justice to allow the filing of such amended complaint, and will be based upon this notice, the attached points and authorities, and the attached declaration of Azariah M. Ellington.

Dated: December 17, 1992

By: _____
Azariah M. Ellington
In Pro Per

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POINTS AND AUTHORITIES SUPPORTING MOTION

1. The court may, in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or PROCEEDING. THE court may likewise, in its discretion, after notice to the adverse party, allow, upon such terms as may be just, an amendment to any pleading or proceeding in other particulars....". **[CCP section 473]**

2. It is judicial policy to resolve all disputes between the parties on their merits, and to allow amendment of the pleadings to put all such disputes at issue at the time of trial.

> "While a motion to permit an amendment to a pleading to be filed is one addressed to the discretion of the court...it is a rare case in which a court will be justified in refusing a party leave to amend his pleadings so that he may properly present his case.....If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error, but an abuse of discretion."

3. "Trial courts are vested with the discretion to allow amendments to pleadings in furtherance of justice..... That trial courts are to liberally permit such amendments at any stage of the proceeding, has been established policy in this state.... resting on the fundamental policy that cases should be decided on their merits."

[**Hirsa v. Supperior Court (Vickers)** (1981) 118 CA3d 486, 173 Cal.Rptr. 418]

4. Where change in law subsequent to filing original complaint demonstrates possibility of recovery on new legal theory, but same general set of facts, courts should permit amendment of complaint to set forth such theory.

[**Marasco v. Wadsworth** (1978) 21 C3d 82, 146 Cal. Rptr. 843]

Page 10 of Petition for Writ of Certiorari

Supreme Court Rule 10.1 (c)

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only when there are special and important reasons therefor. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered:

(c) When a state court or a United States court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

Private individual may be subject to liability under § 1983 if he or she willfully collaborated with official state actor in deprivation of federal right, while state actor may be subject to liability for action physically undertaken by private actors in violation of plaintiff's liberty or property rights if state actor directed or aided and abetted the violation. **Duares v. City of N.Y., C.A.2 (N.Y.)** 1993, 985 F3d 94

Mere recourse to state or local court procedures does not, by itself, amount to "joint activity" with state that would be sufficient to subject private party to liability under § 1983; "joint activity" theory requires, at minimum, some overt and significant state participation in challenged action. **Hoai v. Vo,** C.A.D.C. 1991, 935 F.2d 308

Private parties who corruptibly conspire with state officials to maliciously prosecute an individual act under color of state law and can be sued by the individual under federal civil rights statute; plaintiff attempting to prove such a conspiracy must show that the parties reached an understanding to deny plaintiff his or her rights, the conspiratorial acts must impinge upon the federal right, and the plaintiff must prove an actionable wrong to support the conspiracy**N.A.A.C.P. v. Hunt**, C A 11 (Ala) 1990, 891 F 2d 1555

As the language itself makes clear, the central purpose of § 1983 is to "give a remedy to parties deprived of constitutional rights, privileges and immunities by an official's abuse of his position" Monroe v Pape, 365 US 167, 172 5 L Ed 2d 492, 81 S Ct 473 (1961). The United States Constitution among other things, places substantial limitations upon state action, and the cause of action provided in 42 USC § 1983 [42 USCS § 1983] is fundamentally one for "misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law." United States v Classic, 313 US 299, 326, 85 L Ed 1368, 61 S Ct 1031 (1941). It is manifest then that all state officials as a class cannot be immune absolutely from damage suits under 42 USC § 1983 [42 USCS § 1983] and that to extend absolute immunity to any group of state officials is to negate pro tanto the very remedy which it appears Congress sought to create. Scheuer v Rhodes, 416 US 232, 243, 40 L Ed 2d 90,

94 S Ct 1683 (1974) Thus, as there is no language in 42 USC § 1983 [42 USCS § 1983] extending any immunity to any state officials, the Court has not extended absolute immunity to such officials in the absence of the most convincing showing that the immunity is necessary **Imbler v. Pachtman** 424 U.S. 409, 47 L Ed 2d 128, at 145, 96 S Ct 984

In considering a motion to dismiss, the factual allegations of the complaint must be taken as true and all reasonable inferences must be indulged in favor of the plaintiff *Mitchell v. King*, 537 F2d 385 (10th Cir 1976); *Dewell v. Lawson*, 489 F2d 877 (10th Cir 1974) A complaint should not be dismissed unless it appears beyond a doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief *Conley v. Gibson*, 355 U.S. 41, 45-46, 78 S Ct 99, 101-102, 2 L Ed2d 80 (1957) The question is not whether a plaintiff will ultimately prevail, but whether he is entitled to offer evidence to support his claims *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S Ct 1683, 1686, 40 LEd2d 90 (1974) **Steele v. Stephan**, 633 F Supp 950

Thus, we concluded that it is "not unfair to hold liable the official who knows or should know he is acting outside the law," and that "insisting on awareness of clearly established constitutional limits will not unduly interfere with the exercise of official judgment." *Butz v. Economou*, 438 U.S. 478, 98 S Ct 2894, at 2911, 57 L Ed 2d 895 (1978); **U.S. v. Stanley** 483 U.S. 669, at 697, 107 S Ct 3054, at 3071, 97 L Ed 2d 550

We therefore hold that government officials performing discretionary function generally are shielded from liability for civil damage insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Procunier v. Navarette*, 434 U.S. 555, 565 98 S.Ct. 855, 861, 55 L.Ed.2d 24 (1978); *Wood v. Strickland*, 420 U.S., at 322, 95 S.Ct., at 1001. **Harlow v. Fitzgerald** 457 U.S. 800, 817, 102 S.Ct. 2727, 2738, 73 L.Ed2d 396.

Allegation that defendants knowingly and willfully conspired and agreed among themselves to interfere with plaintiff's privacy and committed acts in controversy in furtherance of conspiracy, resulting in damages set forth in incorporated causes of action, was sufficient to state a cause of action for conspiracy to interfere with the contractual relationships and to invade privacy. **H & M Associates v. City of El Centro** (1980) 167 Cal.Rptr. 392, 09 C.A.3d 399

Federal and State Constitutions guarantee that no state shall deprive any person of life, liberty, or property without due process of law. **In re Marilyn H.** (1993) 19 Cal.Rptr.2d 544, 5 Cal.4th 295, 851 P.2d 826

Not all speech is protected by First Amendment; as speech, fraud, misrepresentation, and deceit are unprotected by First Amendment. **State v. Monastero** 1988, 424 N.W.2d 837, 228 Neb. 818, appeal dismissed 109 S.Ct. 358, 488 U.S. 936, 102 L.Ed2d 349

In general, speech mixed with conduct may be more significantly regulated than pure speech. **Farina v. U.S.** D.C.App.1993, 622 A.2d 50

Where individual violates otherwise valid criminal statute, First Amendment does not act as shield to preclude prosecution of that individual simply because his criminal conduct involves speech. **U.S. v. Riggs** N.D.Ill.1990, 743 F.Supp. 556

Fact that speech of newspaper and reporter may have been constitutionally privileged under First Amendment did not automatically protect them from private action for intentional infliction of emotional distress based on publication of article. **Upchurch v. New York Times Co.** S.C. 1993, 431 S.E.2d 558

Rule which provided that it is professional misconduct for lawyer to engage in conduct that is prejudicial to administration of justice is not vague, so as to have chilling effect on First Amendment rights. **Matter of Anderson**, 1990, 795 P.2d 64, 247 Kan. 208, certiorari denied 111 S.Ct. 985, 498 U.S. 1095, 112 L.Ed.2d 1069

Speech which is critical of court or judge is protected by First Amendment unless it presents clear and present danger that it will influence court's decision in pending case **Coleman v. Caddo Parish School Bd,** La App 2 Cir 1994, 635 So 2d 1238

"Actual malice," in defamation context, does not mean "ill will," but means knowledge that statement was false, or doubts about its truth couple with reckless disregard of whether it was false **Underwager v. Salter** C A 7 (Wis) 1994, 22 V 3d 730

Where information is from a source known to be hostile to subject against whom material is to be used, failure to investigate truth of allegations solely received from such source may support finding that publication has been made in wanton and reckless disregard of veracity **Fisher v. Larsen** (1982) 78 L Ed2d 335, 464 U S 959, 138 C A 3d 627, 188 Cal Rptr 216

Privilege for publications or broadcasts made in judicial proceeding applies only to communicative acts and does not privilege tortious courses of conduct West's Ann Cal Civ Code 47(b)(2) **Kupiec v. American Intern. Adjustment Co.** (1991), 235 Cal App 3d 1329 1 Cal Rptr 2d 371

"Privilege" for statements made in course of judicial proceeding did not preclude court from making evidentiary use of statements made during negotiation sessions in prior lawsuit in determining whether defendant in abuse of process action acted for improper "ulterior" purpose. **Oren Royal Oaks Venture v. Greenberg, Bernhard, Weiss & Karms, Inc.** (1986) 42 C.3d 1157, 232 Cal.Rptr. 567.

"In all such instances the unsuccessful party is really prevented, by the fraudulent contrivance of his adversary, from having a trial; but when he has a trial he must be prepared to meet and expose perjury then and there. He knows that a false claim or defense can be supported in no other way; that the very object of the trial is, if possible, to ascertain the truth from the conflict of evidence, and that necessarily the truth or falsity of the testimony must be determined in deciding the issue. The trial is his opportunity for making the truth appear... **Kachig v. Boothe**22 Cal.App.3d 626, 634, 99 Cal.Rptr. 393,397

Privilege for publications or broadcasts made in judicial proceedings applies to any communication (1) made in judicial or quasi-judicial proceeding, (2) by litigants or other participants authorized by law, in or out of court, (3) to achieve objects of litigation, and (4) has some connection or logical relation to action. West's Ann.Cal.Civ. Code **Kupiec v. American Intern. Adjustment Co.**235 Cal.App.3d 1329, Cal.Rptr.2d 371

We conclude that *Williams* and *Heninger* correctly held that an injured claimant has a right of recovery under *Royal Globe* only upon proof that the insured was actually liable to the third party claimant. If the insured is not liable for the claimant's injury, the claimant has no right to damages from the insured, and the claimant cannot be permitted to recover for "unfair conduct" by the insurer in refusing to settle and underlying unmeritorious claim. **Moradi-Shala v. Fireman's Fund Ins.** 46 Cal.3d 287,308,250 Cal.Rptr. 116, 129, 758 P.2d 58

"To deny the injured party the right to recover any actual damages in such cases, because they are of a nature which cannot be thus certainly measured, would be to enable parties to profit by, and speculate upon, their own wrongs, encourage violence and invite depredation. Such is not and cannot be the law..." **Parchment Co. v. Paterson P. Paper Co.** (1931) 282 U.S. at p. 564, 51 S.Ct. at p251, citing **Gilbert v. Kennedy** (1871) 22 Mich. 117, 130.

Attorneys would not be provided especially broad application of this section rendering privileged publication or broadcast made in judicial proceeding, the litigation privilege, to avoid conflict of interest that might result if attorney were forced to defend against invasion of privacy or illegal conduct claim as codefendant with clients, so as to immunize attorney from liability for alleged misconduct in aiding and abetting violation of Privacy Act [Penal Code Section 630 et seq.]. **Kimmel v. Goland** (1990) 51 Cal.3d 202, 793 P.2d 524, 271 Cal.Rptr. 191.

Title 28 § 1257. State courts; certiorari

(a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

The profession of the law possesses extraordinary powers. Lawyers can make the arrogant humble and the weak strong. In control of the course of litigation and armed with the knowledge of right and wrong, they are most able to abjure illegal or tortious conduct; it is their duty to do so. As occupants of a high public trust and officers of the court, they are expected to conform their behavior in legal affairs to a higher standard of rectitude and spirit of obedience than those who are willing to endure the dust of transgression.
Guided by oath, duty and obligation, the lawyer's path avoids the vices from which the virtuous abstain. Thus, it ill suits the profession to seek immunity for injuries inflicted while engaged in legal warfare under the protective tarpaulin of the privilege for "judicial proceedings. **Kimmel v. Goland** (1990) 51 Cal.3d 204, 213, 271 Cal.Rptr. 191, 198.

Finally, in immunizing participants from liability for torts arising from communications made during judicial proceedings, the law places upon litigants the burden of exposing during trial the bias of witnesses and the falsity of evidence, thereby enhancing the finality of judgments and avoiding an unending roundelay of litigation, an evil far worse than an occasional unfair result. **Silberg v. Anderson** (1990) 50 Cal.3d. 205, 214; 266 Cal.Rptr. 638, 643.

As indicated above, a reviewing court, should not disturb the exercise of a trial court's discretion unless it appears that there has been a miscarriage of justice. This, in Loomis v. Loomis, 181 Cal.App2d 345, 348-349 [4-6], 5 Cal.Rptr. 550, 552 [2-4], it was said: "it is fairly deducible from the cases that one of the essential attributes of abuse of discretion is that it must clearly appear to effect injustice. Discretion is abused whenever, in its exercise, the court exceeds the bounds of reason, all of the circumstances before it being considered. The burden is on the party complaining to establish an abuse of discretion, and unless there has been a miscarriage of justice a reviewing court will not substitute its opinion and thereby divest the trial court of its discretionary power." (See also City of Los Angles v. Superior Court, 271 Cal.App. 292, 294 [1], 76 Cal.Rptr. 256; Ordway v. Arata, 150 Cal.App2d 71, 78 309 P.2d 919; Estate of Hart, 119 Cal.App2d 310, 318 [12], 259 P.2d 703.) **Denham v. Superior Court of Los Angeles County**, 2 Cal.3d 557, 568, 86 Cal.Rptr 65, 71, 468 P.2d 193

If the motion to amend is timely made and the granting of the motion will not prejudice the opposing party, it is error to refuse permission to amend and where the refusal also results in a party being deprived of the right to assert a meritorious cause of action or a meritorious defense, it is not only error but an abuse of discretion. Cal.Cas**Gen. Ins. v. Superior Court** 173 Cal.App.3d 274, 279, 218 Cal.Rptr. 817, 819

Although it would have been preferable for plaintiff to have specified the basis for amendment in addition to stating the relief requested on motion to amend complaint, the error was not a ground for denying the motion to ame**Raya v. Maryatt Industries**, N.D.Cal.1993, 829 F.Supp. 1169

Leave to amend pleading should be freely granted to correct or clarify insufficient statement of court's jurisdictional basis over suit. **Jacobi v. Blocker**, E.D.Va.1994, 153 F.R.D. 84

Fact that plaintiff pleads improper legal theory in complaint does not preclude recovery under proper theory and selection of improper remedy in demand is not fatal if claim indicates that pleader is entitled to some other relief; sufficiency of pleading is tested by statement of claim, and demand for judgment is not considered part of cla**Dimuccio v. D'Ambra**, M.D.Fla.1991, 779 F.Supp. 1318

Short and plain statement of claim showing that pleader is entitled to relief, need not be factually detailed, but it must give defendant fair notice of what plaintiff's claim is and grounds upon which it rest**Gallardo v. Board of County Com'rs, Kearny County Kan.** DKan.1994, 857 F.Supp. 783

Despite statutory language indicating "reasonableness" standard, statutory sanctions for vexatious filings are not awarded unless attorney acted recklessly or in bad faith; however, unlike sanctions under Rule 11, pleading does not have to be entirely frivolous for statutory sanctions to attach, so long as finding of bad faith or recklessness is made**In re Keegan Management Co., Securities Litigation** N.D.Cal.1994, 154 F.R.D. 237

Fraud in the factum is such fraud in procurement of the execution of an instrument as results in the signer's being ignorant of the nature of the instrument he is signing. The theoretical basis of the defense of fraud in the factum is the absence of a meeting of the minds, the mutual assent necessary to the creation of a binding contract. If the signer of a contract misapprehends the terms of a document, then he has not, in fact, assented to its true terms. Signatures to written releases obtained by fraud in the factum render such releases void. Such a fraud or misrepresentation may be deemed to have induced a party's signing of a release if it substantially contributes to his decision to manifest his consent. A release of a claim of personal injuries may be rendered void on the grounds of fraud or misrepresentation regarding the nature of the claim covered by the release so long as the releasor's failure to learn the nature of the terms was not attributable to his own negligence. Where a release was obtained by fraud in the factum, the failure of a releasor to read the contracts does not prevent courts from declaring such contracts void. **Frusetta v. Hauben**(1990, 2nd Dist) 217 CA3d 551, 266 Cal.Rptr. 62.

Where part of an act, declaration, conversation, or writing is given in evidence by one party, the whole on the same subject may be inquired into by an adverse party; when a letter is read, the answer may be given; and when a detached act, declaration, conversation, or writing is given in evidence, any other act, declaration, conversation, or writing which is necessary to make it understood may also be given in evidence. **Evidence Code Section 356.**

In negligence action, statement by police officer that witness to automobile accident had told him that first driver had gone by fast was admissible as part of conversation that had already been admitted regarding second driver's ability to go through intersection. **Carson v. Facilities Development Co.** (1984) 36 C.3d 830, 206 Cal.Rptr. 136.

Further testimony of insured regarding remainder of conversation between insured and insurance representative was admissible as having some bearing upon, or connection with, admission of part of conversation in evidence and as prior consistent statements. **Sprague v. Equifax Inc.** (App. 2 Dist. 1985) 166 C.A.3d 1012, 213 Cal.Rptr. 69.

Conviction for perjury requires that accused have specific intent to make false statement under penalty of perjury; statement must be known by accused to be false at time it was made and must be willfully made. **West's Ann. Cal. Penal Code Section 118 - People v. Story** (1985 2 Dist) 168 C.A.3d 849, 216 Cal.Rptr. 158.

Police officer who would deliberately lie in affidavit in support of issuance of search warrant to mislead magistrate would be subject to prosecution for perjury, and any officer who would willfully procure another officer to commit such perjury would be guilty of subornation of perjury. **West's Ann. Cal. Penal Code Sections 118, 119, 127. -People v. Truer**(1985 5 Dist) 168 C.A. 3d 437, 214 Cal.Rptr. 869.

In perjury prosecutions, material false statement is one which is relevant to any subsidiary issue under consideration**18 U.S.C.A. Section 1621. - U.S. v. Clark** (1990 Cal.) 918 F.2d 843.

Defect, if any, in complaint charging that first driver on certain date a certain place drove tractor and trailer combination on highway in speed in excess of 50 miles per hour in violation of certain section of Vehicle Code was entirely procedural in nature and was effectively waived for all purposes in absence of objection, and therefore information charging that first truck driver and second truck driver concocted story designed to clear first truck driver of speeding charge, and that second truck driver gave false testimony preventing conviction of first truck driver sufficiently state perjury, subornation of perjury, and conspiracy to obstruct justice.**West's Ann. Vehicle Code, Sections 15, 22406, 40300, 40503. - Brown v. Superior Court** (1965) 234 C.A.2d 628, 44 Cal.Rptr. 519.

The root requirement of the Due Process Clause is that an individual be give an opportunity for a hearing before he is deprived of any significant protected interest; hearing required before termination of employment. **Zinermon v. Burch** 494 U.S. 126; 110 S.Ct. 984.

Due Process clause of Fourteenth Amendment protects an individual's rights of access to civil courts, and deprivation if this right is actionable under **Section 1983, Woodard v. Mennella**, (EDNY 1994) 861 F.Supp. 192.

The right to sue and defend in the courts is the alternative of force, and it is one of the highest and most essential privileges of citizenship, and must be allowed by each state to the citizens of all other states to the precise extent that it is allowed to its own citizens. **Chambers v. Baltimore, etc. R. Co.,** (Ohio 1907) 28 S.Ct. 34, 207 US 142, 52 L.Ed. 143.

A § 1983 conspiracy claim may arise when a private actor conspires with a state actor to deprive a person of a constitutional right under color of state law. **Dixon v. City of Lawton**, Okl., C.A.10 (Okl.) 1990, 898 F.2d. 1443.

Justice, indeed, must satisfy the appearance of justice, and this stringent rule may sometimes bar trial even by judges who have no actual bias and who would do their very best to weigh the scales of justice equally between contending parties. **Concrete Pipe & Prod. v. Const. Laborers Pen. Tr.** (1993) 113 S.Ct. 2254, 2277

Since the causes of action in the amended complaint were different legal theories arising from the same basic facts, the alleged improper treatment of plaintiff's foot, the trial court erred in refusing to allow the complaint to be amended. **Herrera v. Superior Court** (1984) 158 Cal.App.3d. 255; 204 Cal.Rptr. 553, 556.

Allegations in state court defendant's pro se complaint, that state trial judge had acted out of spite or annoyance in refusing to sign journal entry to permit defendant to appeal, was sufficient to state claim under § 1983 for violation of defendant's due process rights. **Olson v. Hart**, C.A.10 (Kan.) 1992, 965 F2d. 940.

Purpose of rule depriving trial court of jurisdiction pending appeal in civil actions is to protect jurisdiction of appellate court; the rule prevents trial court from rendering the appeal futile by changing the judgment into something different; accordingly, whether a matter is embraced in or affected by a judgment within the meaning of this section providing that the perfecting of an appeal stays proceedings in the trial court upon the judgment or order or upon the matters embraced therein or affected thereby, depends on whether postjudgment proceedings on the matter would have any effect on the effectiveness of the appeal. **In re Marriage of Horowitz** (App. 1 Dist. 1984) 159 C.A.3d 377; 205 Cal.Rptr. 880.

I perceive no substantial countervailing reason why at the certiorari stage this federal policy should not be applied to state cases presenting arguably substantial federal questions. **American Manufacturers Mutual Insurance Co. et al. v. American Broadcasting - Paramount Theatres, Inc. (1966)** 87 S.Ct. 1

The Anglo-American system of law is based not upon transcendental revelation but upon the conscience of society ascertained as best it may be by a tribunal disciplined for the task and evironed by the best safeguards for disinterestedness and detachment. **Bartkus v. Illinois,** 359 US 121, 79 S.Ct. 676

Some of the apparent confusion over the meaning of "sham" may stem from our use of the word "genuine" to denote the opposite of "sham". The word "genuine" has both objective and subjective connotations. On one hand, "genuine" means "actually having the reputed or apparent qualities or character." Webster's Third New International Dictionary 948 (1986). "Genuine" in this sense governs Federal Rule of Civil Procedure 56, under which a "genuine issue" is one "that properly can be resolved only by a finder of fact because [it] may reasonably be resolved in favor of either party." On the other hand, "genuine" also means " sincerely and honestly felt or experienced." Webster's Dictionary, *supra*, at 948. To be sham, therefore, litigation must fail to be "genuine" in both senses of the word.6

6. *In surveying the "forms of illegal and reprehensible practice which may corrupt the administrative or judicial processes and which may result in antitrust violations," we have noted that "unethical conduct in the setting of the adjudicatory process often results in sanctions" and that "[m]isrepresentations, condoned in the political arena, are not immunized when used in the adjudicatory process." California Motor Transport, 404 US., at 512-513, 92 S.Ct., at 613. We need not decide here whether and, and if so, to what extent Noerr permits the imposition of antitrust liability for a litigant's fraud or other misrepresentations. Cf. Fed.Rule Civ. Proc. 60(b)(3) (allowing a federal court to "relieve a party ... from a final judgment" for "fraud ..., misrepresentation, or other misconduct of an adverse party"); Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 176-177, 86 S.Ct. 347, 349-350, 15 L.Ed. 2d 247 (1965); id., at 179-180, 86 s.Ct., at 351-352 (Harlan, J., concurring).*

Professional Real Estate Investors v. Columbia Pictures Ind., Inc. (1993) 113 S.Ct. 1920, 1928-1929.

Mislabeling cause of action is immaterial, if facts that justify imposition of liability on defendant are alleged and proved.

Gagne v. Bertran (1954) 43 C.2d. 481, 275 P.2d. 15.

Nature and character of a pleading are to determined from its allegations, regardless of what they may be called, and the subject matter of the action and issues involved are determined from the facts alleged than from the title of the pleading. **Kreutzer v. San Diego County** (1984) 153 CA 3d 62, 100 Cal.Rptr. 322.

However, not all speech is protected by the first amendment. The U.S. Supreme court stated, in Konigsberg v. California State Bar, 366 U.S. 36, 49, 81 S.Ct. 997, 1006, 6 L.Ed. 2d 105 (1961):

> *At the outset we reject the view that freedom of speech and association ... as protected by the First and Fourteenth Amendments, are "absolutes," not only in the undoubted sense that where the constitutional protection exists it must prevail, but also in the sense that the scope of that protection must be gathered solely from at literal reading of the First Amendment.*

The Konigsburg Court noted at 49-50 n. 10, 81 S.Ct. at 1006 n. 10.

> *That view [freedom of speech is absolute], which of course cannot be reconciled with the law relating to libel, slander, misrepresentation, obscenity, perjury, false advertising, solicitation of crime, complicity by encouragement, conspiracy, and the like, is said to be compelled by the fact that the commands of the First Amendment are stated in unqualified terms: "Congress shall make no law ... abridging the freedom of speech..."*

Consequently, as speech, fraud, misrepresentation, and deceit are unprotected by the first amendment. **State v. Monastero** (Neb. 1988) 424 N.W.2d 837, 843

California Civil Code Section 47
and
California Civil Code Section 47, amended as of January 1, 1995

Re: The Malice Element

A privileged publication or broadcast is one made:

(a) In the **proper discharge** of an official duty.

(b) In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Section 2031 of the Code of Civil Procedure.

(3) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

(c) In a communication, **without malice**, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

(d) By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) or a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

(e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.

CALIFORNIA CIVIL CODE SECTION 47, AMENDED JANUARY 1, 1995.

The people of the State of California do enact as follows:

SECTION 1. It is the intent of the Legislature in amending Section 47 of the Civil Code to overturn the decision in **California Dredging Company v. Insurance Company of North America, 18 Cal. App. 4th 572.**

Section 2. Section 47 of the Civil Code is amended to read:

47. A privileged publication or broadcast is one made:

(a) In the **proper discharge** of an official duty.

(b) In any (1) legislative proceeding, (2) judicial proceeding, (3) in any other official proceeding authorized by law, or (4) in the initiation or course of any other proceeding authorized by law and reviewable pursuant to Chapter 2 (commencing with Section 1084) of Title 1 of Part 3 of the Code of Civil Procedure, except as follows:

(2) This subdivision does not make privileged any communication made in furtherance of an act of intentional destruction or alteration of physical evidence undertaken for the purpose of depriving a party to litigation of the use of that evidence, whether or not the content of the communication is the subject of a subsequent publication or broadcast which is privileged pursuant to this section. As used in this paragraph, "physical evidence" means evidence specified in Section 250 of the Evidence Code or evidence that is property of any type specified in Section 2031 of the Code of Civil Procedure.

(3) This subdivision does not make privileged any communication made in a judicial proceeding knowingly concealing to existence of an insurance policy or policies.

(4) A recorded lis pendens is not a privileged publication unless it identifies an action previously filed with a court of competent jurisdiction which affects the title or right of possession of real property, as authorized or required by law.

(c) In a communication, **without malice**, to a person interested therein, (1) by one who is also interested, or (2) by one who stands in such a relation to the person interested as to afford a reasonable ground for supposing the motive for the communication to be innocent, or (3) who is requested by the person interested to give the information.

(d) By a fair and true report in a public journal, of (1) a judicial, (2) legislative, or (3) other public official proceeding, or (4) of anything said in the course thereof, or (5) or a verified charge or complaint made by any person to a public official, upon which complaint a warrant has been issued.

(e) By a fair and true report of (1) the proceedings of a public meeting, if the meeting was lawfully convened for a lawful purpose and open to the public, or (2) the publication of the matter complained of was for the public benefit.